TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 428.

FEDERAL LAND BANK OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

D. W. CROSSLAND, JUDGE OF PROBATE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

FILED JUNE 13, 1932.

(28,978)

(28,978)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 428.

FEDERAL LAND BANK OF NEW ORLEANS, PLAINTIFF IN ERROR,

vs.

D. W. CROSSLAND, JUDGE OF PROBATE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

INDEX.

	Original.	Print.
Record from the circuit court of Montgomery County	1	1
Docket entries	1	1
Petition for mandamus	3	1
Exhibit A—Mortgage, Ashley to Federal Land Bank of New Orleans, November 15, 1919	4	3
Answer of respondent	10	7
Judgment reviving cause	14	10
Judgment of court	14	11
Security for costs	15	11
Writ of error	15	12
Clerk's certificate	16	12
Assignment of errors	17	13
Submission	18	13
Judgment	18	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 4, 1922.

	Original.	Print.
Judgment on rehearing	19	14
Order denying application of appellee for rehearing	19	15
Opinion, Anderson, C. J.	20	16
Opinion, Anderson, C. J., on rehearing	23	18
Opinion, McClellan, J., dissenting	24	19
Opinion, Miller, J., dissenting	31	23
Petition for writ of error	38	28
Order allowing writ of error	39	29
Writ of error	40	30
Assignment of errors	42	31
Bond on writ of error	44	32
Citation and service	46	33
Clerk's certificate	47	34

1-2 3 Div. 552. Original. Miller, J.

D. W. CROSLAND, Judge of Probate, Appellant,

vs.

FEDERAL LAND BANK, Appellee.

Appeal from Circuit Court of Montgomery County.

[*Filing.*]

Filed Supreme Court of Alabama Dec. 15, 1921.
ROBT. F. LIGON,
Clerk.

Dec. 22, 1921. Submitted on briefs.
Jan. 19, 1922. Affirmed, Miller, J., Anderson, C. J., Sayre and Gardner, JJ., concur.
Feb. 1, 1922. Application for rehearing filed.
Feb'y 25th, '22. " " " granted. Judgment of affirmance set aside, and reversed and remanded. Sayre, Somerville, Gardner and Thomas, JJ., concur. McClellan and Miller, JJ., dissent.
Mar. 9, 1922. Application for rehearing filed.
May 11, 1922. Opinion extended, and overruled.

3 THE STATE OF ALABAMA,
Montgomery County:

At a regular term of the Circuit Court of Montgomery County at which the officers authorized by law to hold or serve such Court were serving the following proceedings were had in the cause styled Federal Land Bank of New Orleans, Petitioner, versus D. W. Crossland, Judge of Probate of Montgomery County, Alabama, Respondent.

Petition for Mandamus.

To the Honorable Leon McCord, Judge of said Court:

Your petitioner, Federal Land Bank of New Orleans, respectfully shows and represents unto your Honor that it is a Federal Land Bank for the sixth Federal Land Bank District which said district includes the State of Alabama; that petitioner was organized and exists under and by authority of an act of Congress of July 17th, 1916, and is engaged in the business of lending money in accordance with said Act of Congress and receiving as security therefor mortgages upon lands situated in said District.

That by said Act of Congress first mortgages executed to Federal Land Banks are deemed and held to be instrumentalities of the

Government of the United States and as such they and the inc
derived therefrom *is* exempt from Federal, State, Municipal
local taxation.

That in pursuance of the said powers of petitioner it receive
security for a loan to be made by it a first mortgage execute
petitioner a copy of which said mortgage is attached hereto ma
Exhibit "A" and made a part hereof with leave of reference; that
towit, March 23rd, 1920, petitioner offered said mortgage to Ch
B. Teasley, Judge of Probate of Montgomery County, Alabama,
record in said office and at the same time tendered to said Charle
Teasley, Judge of Probate the sum of Three and 25/100 ($3.
Dollars, being the amount of the filing fees required in filing
mortgage of record.

That said Charles B. Teasley refused to receive said mortgage
record and to record the same until and unless petitioner should
a further and additional sum equal to the sum of fifteen (15¢) c
per one hundred dollars or fraction thereof of the princ
4 sum secured by said mortgage required by Schedule 71 o
Act of the Legislature of Alabama, approved September 1
1919; and still refuses to receive said mortgage for record an
record the same without the payment of said sum.

Wherefore petitioner prays for the alternative writ of manda
to be issued out of this Honorable Court and addressed to th
Charles B. Teasley, Judge of Probate of Montgomery County,
bama, requiring and commanding him to receive for record an
record the said mortgage without the payment of said mortgage
or privilege tax required by said Act of the Legislature of Alab
to be paid.

TILLEY & ELMORE,
Attorneys for Petitione

THE STATE OF ALABAMA,
County of Montgomery:

Before me, Henry N. Hughes, Clerk of the Circuit Court of M
gomery County, personally appeared Ludlow Elmore, who is kn
to me and who being by me duly sworn doth on oath depose and
that he is the agent of Federal Land Bank of New Orleans an
authorized to make this affidavit; that the allegations containe
the foregoing petition are true.

LUDLOW ELMOR

Sworn to and subscribed before me, this the 24th day of M
1920.

H. N. HUGHES,
Clerk of the Circuit Court of
Montgomery Count

EXHIBIT "A."

(Alabama Form "A-X.")

THE STATE OF ALABAMA,
Montgomery County:

Know all men by these presents:

That whereas, I, J. M. Ashley, am indebted to The Federal Land Bank of New Orleans in the sum of Three Thousand and no/100 Dollars, which indebtedness with the interest accruing thereon is repayable in 35 fixed annual installments, according to amortization tables adopted by the Federal Farm Loan Board, the terms of which are hereby agreed to. The first installment is for One Hundred Ninety-five and no/100 Dollars, and each subsequent installment is for the sum of One Hundred Ninety-five and no/100 Dollars, except the last one, which is for the sum of One Hundred Eighty-seven and 50/100 Dollars, the first thereof being due on the 15th day of November, 1920, and one on the same date of each year thereafter, until all are paid. Said indebtedness so repayable is evidenced by a note of even date herewith for said principal sum, which with interest thereon at the rate of 5½ per centum per annum included is repayable in the amounts and at the times as aforesaid at the office of The Federal Land Bank of New Orleans, in the City of New Orleans, Louisiana.

Now, in order to secure the prompt payment of the indebtedness hereby secured and the performance of the covenants and agreements herein made and all obligations herein assumed, we, the said J. M. Ashley and wife, Ethel Ashley, hereinafter called the grantors, whether one or more, for and in consideration of the premises, and the sum of Five Dollars to us this day in hand paid by the said The Federal Land Bank of New Orleans, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey, unto the said The Federal Land Bank of New Orleans, its successors and assigns, the following described real estate lying and being situated in the County of Montgomery in the State of Alabama, to-wit:

North half (N. ½) of the northeast quarter (NE. ¼), and east half (E. ½) of southeast quarter (SE. ¼) of northeast quarter (NE. ¼) of section twenty-one (21) township sixteen (16) north range sixteen (16) east of St. Stephens meridian and containing in the aggregate one hundred (100) acres, more or less.

To have and to hold the aforegranted premises, together with the improvements and appurtenances thereunto belonging unto the said The Federal Land Bank of New Orleans, its successors and assigns forever.

And grantors do covenant with the said The Federal Land Bank of New Orleans, hereinafter called mortgagee, its successors and assigns that grantors are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances; that grantors have a good right to sell and convey the same to the said mortgagee,

its successors and assigns, and that grantors will warrant and de
the said premises to the said mortgagee, its successors and ass
forever against the lawful claims and demands of all per
6 But this conveyance is made upon the following c
tions nevertheless, that is to say:

1. Grantors will promptly pay when due each one of said
annual installments and all other lawful debts and charged he
secured.

2. Grantors will during the term of this mortgage, duly
said real estate for taxation at the time prescribed by law and
pay before they become delinquent, all taxes, liens, judgmen
assessments lawfully levied against said real estate, and will fu
by January 1st in each year to said mortgage-, or to the hold
the indebtedness hereby secured, the tax or other receipts sho
such payment, and will keep the buildings and other insurable
provements now or hereafter erected on said premises, ins
against loss or damage by fire or windstorm in such sum as ma
reasonably required by the mortgagee, but not exceeding the am
of the indebtedness hereby secured. Such insurance to be i
sponsible insurance companies, approved or designated by
mortgagee, with loss payable to mortgagee as its interest may ap
and to deliver said policies of insurance to the said mortgagee
that grantors will promptly pay when due all premiums for
such insurance. Should any loss by fire or windstorm occur by
insured improvements the said mortgagee is hereby appointe
torney in fact for grantors to make proof of loss if grantors f
do so and to receipt for any sum so due from any insurance com
which said sums so receipted for may at the option of the mort
be applied as payment on the indebtedness hereby secured or
be used under the direction of said mortgagee for constructi
rebuilding improvements on the lands hereby conveyed.

3. Grantors will take good care of said real estate and wil
commit waste, or allow waste to be committed on same, but
cause the same to be worked and cultivated in a proper and fa
like manner at all times, and that they will not cut nor remov
timber or improvements from said land, except such as ma
needed for grantor's ordinary farm purposes, and further, will
the houses, fences, ditches and other improvements on said la
good condition and repair at all times.

4. Grantors further agree to spend the whole of the loan h
secured for the purposes specified in the original application.

5. Any installment payment or other indebtedness hereby sec
unpaid when due shall thereafter bear interest at the rate of
centum per annum.

7 Now, if said grantors shall pay when due every in
ment of the indebtedness hereby secured and shall faith
and promptly keep and perform each and every one of the

nants and agreements herein made and the obligations hereby assumed, then this instrument shall become null and void, but otherwise in full force and effect. If the grantors fails to pay any such indebtedness when due or fail faithfully and promptly to keep and perform any one of such covenants obligations and agreements, then the mortgagee, its successors and assigns, may at its option only, declare the indebtedness thereby secured, together with the interest thereon, to be immediately due and payable, in which event, the said mortgagee, its successors and assigns, agents or attorneys are hereby authorized and empowered to sell the said property hereby conveyed, at auction for cash, at the Court House door of said county wherein said property lies, first having given notice thereof for three weeks by publication once a week in any newspaper then published in said county or in adjoining county in case no newspaper is published in said county and execute proper conveyance to the purchaser; and out of the proceeds of said sale they shall first pay all expenses incident thereto, together with a reasonable attorney's fee, then retain enough to pay said indebtedness and interest thereon, together with any other debt incurred or secured under the provisions of this instrument, and the balance, if any, pay over to grantors.

In the event of such sale, the said mortgagee, its successors and assigns, agents and attorneys, are hereby authorized and empowered to purchase the said property the same as if they were strangers to this conveyance, and the auctioneer or person making the sale is hereby empowered and directed to make and execute a deed to the purchaser in grantors' names.

And it is also agreed that in case the mortgagee herein, its successors and assigns, or attorneys see fit to foreclose this mortgage in a court having jurisdiction thereof, then grantors will pay a reasonable attorney's fee therefor, which fee shall be and constitute a part of the debt hereby secured.

Each grantor further specially waives all homestead and other exemptions which such grantor has or to which such grantor may be entitled under the Constitution and laws of Alabama or of any other State in regard to the collection of the above debt.

8 And it is further understood that should the grantors fail to pay as hereinabove stipulated all taxes, assessments, liens or judgments, or insure the property and pay the premiums therefor, then the mortgagee, its successors and assigns, may pay any such unpaid taxes, assessments, liens or judgments and insure said improvements, pay the premiums therefor, and without notice, at its option, declare the whole debt secured by this mortgage to be due and payable and proceed to foreclose at once. All taxes, assessments, liens or judgments and insurance premiums paid by the mortgagee, and all necessary expenses incurred by mortgagee in connection therewith shall constitute a part of the debt secured by this mortgage and become immediately due and payable to the mortgagee.

In case any grantor shall become insolvent, or apply to a bankruptcy court to be adjudicated a voluntary bankrupt, or proceedings be instituted against any grantor to pay any such grantor in in-

voluntary bankruptcy, or should any proceedings be taken agai
any grantor looking to the appointment of a receiver, assignee,
trustee, that then, in any case, the whole indebtedness hereby secu
may at the option of the said mortgagee, be declared due and p
able.

At any payment date after five years from date of the executi
hereof the said grantors, their heirs or assigns, may pay off the
debtedness hereby secured, either in whole or in part, but if in p
only, then it must be in the sum of twenty-five dollars or multip
thereof. Such partial payments shall not reduce the amounts
the installments thereafter due, as fixed herein, but will be held
satisfy the loan at an earlier date by reducing the percentage of s
sequent payments applicable to interest and increasing the perce
age applicable to principal.

All the rights and protective conditions herein conferred up
said mortgagee shall ensure to the benefit of its successors and
signs and to the owner or holder of the indebtedness hereby secur

In testimony whereof the said grantors have hereunto set
hands and affixed our seals, this the 15th day of November, A.
1919.

(Signed) J. M. ASHLEY. [L. S.]
(Signed) ETHEL ASHLEY. [L. S.]

9 THE STATE OF ALABAMA,
Montgomery County:

I, Grover Keyton, a notary public in and for said county a
State, hereby certify that J. M. Ashley and wife, Ethel Ashl
whose names are signed to the foregoing mortgage, and who
known to me, acknowledged before me on this day that, being
formed of the contents of the mortgage, they executed the sa
voluntarily on the day the same bears date.

Given under my hand, this 4th day of December, A. D. 1919.

[SEAL.] (Signed) GROVER KEYTON,
Notary Public (Official title).

My commission expires June 13th, 1923.

THE STATE OF ALABAMA,
Montgomery County:

I, Grover Keyton, a notary public in and for said county a
State, do hereby certify that on the 4th day of December, 1919, ca
before me the within named Ethel Ashley, known to me to be t
wife of the within named J. M. Ashley, who being examined separ
and apart from the husband touching her signature to the with
mortgage, acknowledged that she signed the same of her own f
will and accord, and without fear, constraint or threats on the part
the husband.

In witness whereof, I hereunto set my hand, this 4th day of December, A. D. 1919.

[SEAL.] (Signed) GROVER KEYTON,
Notary Public (Official title).

My commission expires June 13th, 1923.

Filed, March 24th, 1920.

10 *Answer of Respondent.*

Answer of respondent, D. W. Crosland, as Judge of Probate of Montgomery County, Alabama, in the matter of the petition filed by The Federal Land Bank of New Orleans, addressed to the Honorable Judges of the Fifteenth Judicial Circuit of Alabama, at Montgomery, Alabama, praying for the alternative writ of mandamus to be directed to Charles B. Teasley as Judge of Probate of Montgomery County, Alabama, which cause has been revived against D. W. Crosland, as his successor in office, as provided by the statutes of the State of Alabama.

Now comes the respondent, D. W. Crosland, as Judge of Probate of Montgomery County, Alabama, and for answer to the above styled petition says:

For answer to the first paragraph of said petition, respondent admits allegations thereof, but alleges in addition thereto that while said bank is authorized to loan money upon farm lands within the State of Alabama and to receive as security therefor first mortgages conveying such lands, such transaction must be done in accordance with the laws of the State of Alabama relating to such transactions, and that the only manner in which said bank can exercise such authority is in accordance with the laws of the State of Alabama.

Second. Respondent admits that Charles B. Teasley, was Judge of Probate at the time of filing said petition, but alleges further that the said Charles B. Teasley on towit, the — day of —— 1920, resigned from said office of Judge of Probate of Montgomery County, Alabama, and that respondent is now the Judge of Probate of Montgomery County, Alabama, and has been such since on, towit, the — day of ——, 1920.

Third. Respondent admits that on, towit, March 1, 1920, A. S. Ashley executed and delivered to the Federal Land Bank of New Orleans a mortgage on certain lands therein described and situated in the County of Montgomery, State of Alabama, said mortgage being executed to secure loan upon said lands made by said Federal Land Bank of New Orleans under the authority of said Farm Loan Act, but respondent alleges that said mortgage was executed in accordance with the laws of the State of Alabama as affecting such transactions.

Fourth. Respondent, in answer to the fourth paragraph of
11 said petition, says that the allegations of said paragraph are too vague and uncertain to admit of definite acceptance or denial, but alleges that the following is the true statement of facts, towit, that on, towit, March 10th, 1920, said Federal Land Bank of New Orleans, presented to Charles B. Teasley, as Judge of Probate of Montgomery County, Alabama, the mortgagee aforesaid, executed by Ashley to it, and tendered to the said Charles B. Teasley, as such Judge of Probate, the fee allowed the said Judge of Probate by Section 3720 of the Code of Alabama, as his compensation for the labor of recording the same, but refused to comply with the requirements of Schedule 71 of Section 361 of the General Revenue Act of Alabama, approved September 15th, 1919, which so far as affects the matter of filing such mortgage for record, is as follows:

"Section 361. That every person, firm, company, corporation, or association engaged in any business, vocation, occupation, calling or profession hereinafter described for which a license or privilege tax is required, shall first procure a license, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this act."

Schedule 71. Mortgages.—(*a*) No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, and which conveys any real or personal property situated within this state, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, towit: Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars, there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage, deed of trust, contract of conditional sale, or other instrument of like character, to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender. * * * (*h*) Any
12 probate judge who shall file for record, or shall receive any mortgage, deed of trust or other instrument in the nature of a mortgage, without collecting the recording or registration tax provided for the recording or registration of such instruments, or who shall fail to certify the fact that such tax has been paid before the filing and recording of such instrument, shall be guilty of a misdemeanor and upon conviction shall be fined not less than ten nor more than one thousand dollars. (*i*) Any probate judge who fails to keep an abstract of mortgages or other instruments intended to secure the payment of money, which are filed in his office, for record, as he is required by law to keep, shall be guilty of a misdemeanor and upon conviction shall be fined not less than ten nor more than five hundred dollars."

In other words, he refused to pay the amount required by said edule for the privilege of filing said mortgage for record.

Respondent alleges that under said schedule, the said Charles B. asley, as Judge of Probate of Montgomery County, Alabama, and pondent, D. W. Crosland, as his successor in office were and are hibited by said statute from receiving any mortgage for record, matter by whom presented, except upon the payment of said vilege filing tax.

Respondent alleges that the office for recording mortgages in the te of Alabama, kept and administered by the Judge of Probate each of the counties of the State of Alabama, is an instrumentality the State, entirely under the control of the State, and over which Government of the United States has no jurisdiction whatever; t the same is a creature of the State, and all the privileges arising m the recording of mortgages are creatures of the State, and over ich the Government of the United States has no control or au- rity, and that the State has the power at its pleasure, to destroy s agency, and as a necessary consequence thereof, has the right to rge anyone whatsoever for the privilege of the use of this in- umentality of the State.

Wherefore, respondent, says that his predecessor in office, Charles Teasley, and respondent as his successor in office, were bound by laws of the State of Alabama under severe penalties as set forth said Schedule 7, to refuse to file said mortgage for record unless and until such privilege filing tax was paid by the relator, The Federal Land Bank of New Orleans, and that respondent is still bound by the terms of said statute to refuse to file said rtgage for record unless and until such tax is paid. Respondent ther alleges that under the laws of the State of Alabama, said rtgage is a valid contract between the parties thereto, without ing the same recorded, and that the benefits of recording such rtgage are purely statutory and entirely within control of the te and subject to repeal by the State.

Respondent further alleges that national banks which are exempt m the levy of taxes upon such banks or their property except es upon their capital stock and upon their real estate, which es are specially allowed by the laws of the United States, have ays paid this privilege filing tax without question, although their hts with respect to exemption so far as this tax is concerned, is on exact parity with that of the Federal Land Bank of New Orleans. other words, although national banks have exactly the same vileges and immunities with reference to State taxation as do eral land banks except as to capital stock and real property, they e always paid this privilege filing tax without questioning the hority of the State to demand of them such payment. This has n continually the case since the first enactment of this privilege ng tax on March 4, 1903 (Acts 1903, pages 227, 228).

Respondent further alleges that his office is a salaried office, and t he as Judge of Probate of Montgomery County, Alabama, will receive any fees or pay other than such salary. Respondent

further alleges that the recording office administered by respondent was established and is maintained at the expense of the State, and that all charges whether for filing mortgages for record or for recording such mortgages, are paid into the treasury of the State.

And now having fully answered said petition and having in said answer shown cause why he as Judge of Probate of Montgomery County, Alabama, should not be required by this honorable court to file said mortgage for record or to receive the same for record unless and until relator shall pay the filing tax required as aforesaid, respondent prays to be discharged with his reasonable costs in this behalf expended.

D. W. CROSLAND,
As Judge of Probate, Montgomery County, Alabama, Respondent.

Filed, May 12th, 1921.

14 *Judgment Reviving Cause.*

Friday, May 6th, A. D. 1921.

Court met pursuant to adjournment.
Present the Hon. Walter B. Jones, Judge presiding.

2302.

FEDERAL LAND BANK OF NEW ORLEANS

vs.

CHARLES B. TEASLEY, Judge of Probate of Montgomery County, Alabama.

Mandamus.

This day came the parties by their attorneys, and it being proven to the satisfaction of the Court, by competent legal evidence, that demand in writing has been made upon D. W. Crosland, as Judge of Probate successor in office to Charles B. Teasley, and his failure to perform the duty required of him. It is therefore ordered and adjudged by the Court that this cause be and the same is hereby revived against said Crosland as such Judge of Probate, the said D. W. Crosland as Judge of Probate of Montgomery County appears in open Court and defends this cause as party defendant herein.

Judgment of Court.

Tuesday, May 17th, A. D. 1921.

Court met pursuant to adjournment.
Present the Hon. Walter B. Jones, Judge presiding.

2302.

FEDERAL LAND BANK OF NEW ORLEANS

vs.

DAVID W. CROSLAND, Judge of Probate of Montgomery County, Alabama.

Mandamus.

This day came the parties by their attorneys, and issue being ied between the parties, and after hearing the evidence, the Court ng of the opinion, it is considered and ordered by the Court, and s the judgment of the Court, that the petitioner is entitled to ef as prayed for in the petition, and that a peremptory writ of mandamus issue to David W. Crosland, Judge of Probate of Montgomery County, Alabama, commanding and requiring him to receive for record and to record the mortgage men- ied in said petition of petitioner without payment of said mort- e tax or privilege tax required by said act of the legislature of bama to be paid. And it is further ordered by the Court that petitioner go hence and recover of the respondent the cost in behalf expended for all of which let execution issue.

Security for Costs.

We hereby acknowledge ourselves security for the costs on appeal he Supreme Court by the respondent in the case of Farm Loan nk of New Orleans petitioner for mandamus versus D. W. Cros- d, as Judge of Probate for Montgomery County, Respondent.

D. W. CROSLAND,
Judge of Probate.
A. A. EVANS.

pproved this 9th day of June, 1921.

H. N. HUGHES,
Clerk.

iled, June 9th, 1921.

Writ of Error.

THE STATE OF ALABAMA,
Montgomery County:

To any Sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon Tilley & Elmore, Attorneys of Record of Federal Land Bank of New Orleans, to appear at the next term of the Supreme Court of said State, then and there to defend an appeal which D. W. Crosland, as Judge of Probate of Montgomery County, Alabama, has this day sued out returnable to said Court to reverse a judgment which the said Farm Loan Bank of New Orleans at the January Term, 1912, of the Circuit Court of Montgomery County recovered against the said D. W. Crosland, as Judge of Probate of Montgomery County, Alabama, and make immediate return of this writ, etc.

Witness: Henry N. Hughes, Clerk of the said Circuit Court, this 9th day of June, 1921.

H. N. HUGHES,
Clerk.

16 We hereby accept service of the within writ and waive further service by the sheriff, this June 9th, 1921.

TILLEY & ELMORE,
Attorneys for Federal Land Bank of New Orleans.

Clerk's Certificate:

THE STATE OF ALABAMA,
Montgomery County:

I, Henry N. Hughes, Clerk of the Circuit Court of Montgomery County, in and for said State and County, do hereby certify that the foregoing pages numbered from one to fourteen inclusive, contain a full, true and complete transcript of the record and proceedings of said Court in a certain cause lately therein pending wherein Federal Land Bank of New Orleans was petitioner and D. W. Crosland, Judge of Probate of Montgomery County, Alabama, was respondent as fully and completely as the same appears of record in said Court.

And I further specify that the said respondent did on the 9th day of June, 1921, pray for and obtain an appeal from the judgment of said Court to the Supreme Court of Alabama to reverse said judgment on said Court upon entering into bond for the costs of said appeal with A. A. Evans as surety thereon which said bond has been approved by me.

Witness my hand, this the 19th day of November, A. D. 1921.

H. N. HUGHES,
Clerk.

7 [*Assignment of Errors.*]

Now comes the appellant, D. W. Crossland, Judge of Probate by A. A. Evans his attorney, and assigns as error in the ruling of the Circuit Court the following:

First. The Circuit Court erred in granting to petitioner, appellee, Federal Land Bank of New Orleans, the peremptory writ of mandamus.

A. A. EVANS,
Atty. for Appellant.

8 [Minutes 73, October Term 1921, Supreme Court of Alabama, pp. 123, 137, 139.]

Supreme Court, Thursday, Dec. 22nd, 1921.

The Court met pursuant to adjournment.
Present, Chief Justice Anderson and Associate Justices Sayre, Gardner and Miller.

* * * * * * *

Montgomery Circuit Court, 3 Div.

552.

D. W. CROSSLAND, Judge, &c.,

vs.

FEDERAL LAND BANK.

Come the parties by attorneys, and submit this cause on briefs for decision.

* * * * * * *

The Court adjourned until Monday, Jan'y 9th, 1922, at 12 o'clock M.

[pp. 168, 171, 177.]

Supreme Court, Thursday, Jan. 19th, 1922.

The Court met pursuant to adjournment.
Present, Chief Justice Anderson and Associate Justices Sayre, Gardner and Miller.

* * * * * * *

Montgomery Circuit Court, 3 Div.

552.

D. W. CROSLAND, as Judge, &c.,

vs.

FEDERAL LAND BANK.

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant, and D. W. Crosland and A. A. Evans, sureties on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

* * * * * * *

The Court adjourned until Monday, Jan. 30th, 1922, at 12 o'clock M.]

[pp. 211, 212.]

Supreme Court, Saturday, Feb. 25th, 1922.

The Court met pursuant to adjournment.
Present, all the Justices.

[Continue, next page.]

* * * * * * *

19 Montgomery Circuit Court, 3 Div.

552.

D. W. CROSLAND, as Probate Judge, &c.,

vs.

FEDERAL LAND BANK.

Come the parties by attorneys, and it is ordered on motion of the appellant that a rehearing be granted in this cause, and that the judgment of affirmance heretofore entered in this cause on Jan. 19th, 1922, be set aside and vacated: and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the judgment of the Circuit Court be

reversed and annulled, and this Court proceeding to render the judgment the Circuit Court should have rendered doth order and adjudge that the petition for mandamus be and is dismissed at the cost of the petitioner. It is also considered that the appellee pay the costs of appeal of this Court and of the Circuit Court.

* * * * * * *

The Court adjourned until Friday, March 3rd, 1922, at 12 o'clock M.

[319, 320, 329.]

Supreme Court, Thursday, May 11th, 1922.

The Court met pursuant to adjournment.
Present, Chief Justice Anderson and Associate Justices McClellan, Somerville and Thomas.

* * * * * * *

Montgomery Circuit Court, 3 Div.

552.

D. W. CROSSLAND, as Judge of Probate, &c.,

vs.

FEDERAL LAND BANK.

Come the parties by attorneys, and the application for rehearing in this cause filed by the appellee on March 9th, 1922, being duly examined and understood by the Court it is considered that said application be and is overruled.

* * * * * * *

The Court adjourned until Saturday, May 13th, 1922, at 12 o'clock M.

20 Feb. 25, '22. May 11, '22.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, October Term, 1921-22, 3 Div.

552.

D. W. CROSLAND, Judge, etc.,

v.

FEDERAL LAND BANK.

Appeal from Montgomery Circuit Court.

Statement.

The Federal Land Bank of New Orleans offered on March 23, 1920, to the judge of probate of Montgomery County to be recorded a mortgage executed to it by J. M. Ashley and wife, on real estate in that county, to secure a loan of $3,000 cash, made on November 15, 1919. The recording fee of $3.25 was also tendered with the mortgage. The probate judge refused to receive and file the mortgage and to take the $3.25 recording fee, because the Federal Land Bank would not pay him the "privilege or license tax" of fifteen cents on each one hundred dollars of the three thousand dollar indebtedness secured by the mortgage, which amounted to $4.50, as provided by schedule 71 of section 361 of the Revenue Act of 1919. The Federal Land Bank then filed its application for a writ of mandamus in the circuit court of Montgomery county to compel the judge of probate to receive, file and record the mortgage without the payment of the $4.50 tax. The writ of mandamus was awarded on the hearing by the court; the defendant appeals, and this judgment is assigned as error.

21 ANDERSON, *C. J.*:

The tax fixed by schedule 71 of section 361, page 420, of the Revenue Act of 1919, is mentioned as a "privilege or license tax," and is required as a condition precedent to the recording, in the proper office of this State, of the instruments therein mentioned. Notwithstanding the amount of said tax is based or graduated upon the consideration of said instruments, it is in no sense an ad valorem or direct tax. Its payment is not compulsory, but is entirely optional with the holder, if he seeks to get the benefit or protection of our registration laws by using the public records. It was held to be a privilege, and not an ad valorem, tax in the case of Barnes v. Moragne, 145 Ala. 313, and was so designated and treated in the case of Alabama Fuel Co. vs. State, 188 Ala. 487. It is true, that this

last case explains and qualifies an expression in the opinion in the case of Barnes v. Moragne, supra, but not on this point, as these two cases are in thorough accord as to the kind of tax we are now dealing with. Our tax law puts this tax on all instruments therein mentioned offered for record, and provides no exemption; so, if this appellee can get the benefit of recording the mortgage in question, it must rely upon an exemption under the Federal, and not the State, law. It is true, the Federal Farm Loan Act (U. S. Stat. at L., Vol. 39, §26, p. 377) declares the mortgage in question to be an instrumentality of the Government, and that the same shall be exempt from Federal, State, municipal and local taxation; but we think that the exemption refers to a property or ad valorem tax and not to the tax in question. In other words, we cannot conceive of an intent on the part of the Congress to authorize this appellee to use the records of the respective States for the registration of its security and escape the payment of the record or privilege tax exacted of all others.

This holding finds support in the cases of Pocahontas v. Commonwealth, 113 Va. 108, and in an opinion by Attorney General Garland,—Opinions of Atty. Gen., Vol. 18, pp. 491-2, Attorney General Garland said:

22 "The tax is upon the registration of deeds, a means provided by the State for the prevention of fraud in transactions affecting the title to real property; it is not a tax upon either the instrumentalities, agencies, or property of the General Government, strictly speaking.

"The case here does not differ essentially from one where a tax is imposed by the State on the process of its courts and an action in one of these courts is brought by the United States. In such case, doubtless, the United States, unless exempted by the State law, would be liable to pay the tax on process sued out thereby the same as any other suitor would be under like circumstances. The United States may or may not put its deed on record in the county clerk's office, as it may or may not bring its suit in the State court; but where it does either, it would seem to be, equally with private parties, bound to pay the fees and charges therefor imposed by the laws of the State."

True, the Attorney General was dealing with a deed, but it was just as much an instrumentality of the Federal Government as the mortgage in question. Moreover, the Virginia statute that he was dealing with imposed a record tax in addition to the registration fees on mortgages and deeds of trust as well as deeds.—Acts of Va., 1883-4, pp. 561-6, Va. Code, 1887, §579.

We repeat that the payment of the tax in question is purely voluntary on the part of this appellee, as its mortgage cannot be taxed unless it desires to place it upon the records of the State. While section 2 of the Revenue Act of 1919, page 283, in providing exemption from an ad valorem tax is a little involved, as it exempts mortgages which have been filed for record and does not specifically mention unrecorded mortgages, yet the last part of the sentence exempts "all solvent credits," and counsel for the State concede in their brief that

all mortgages, whether recorded or not, are exempt from an ad valorem tax under our statute. This, however, is unimportant in the present case, for, if the mortgage in question is not exempt under our statute from an ad valorem tax, it is under the Federal Act, so as above stated, the payment of this tax is optional with the appellee. If it does not desire to record its mortgage, the same is not liable to a tax; but, if it wishes the benefit and protection of our registration laws, it must, like all others, pay for the privilege.

The trial court erred in awarding the mandamus; that judgment is reversed and one is here rendered dismissing the petition for mandamus.

Reversed and rendered.

Sayre, Somerville, Gardner and Thomas JJ. concur.

McClellan and Miller, JJ., dissent.

23 Upon Rehearing.

ANDERSON, *C. J.*:

It is insisted that there is a conflict between the Alabama Statute and the Federal Farm Loan Act, in that the former requires this mortgage tax to be paid by the lender whereas the latter provides that such a charge can only be paid by the borrower. (A point not made upon the previous consideration of this cause.) Whether or not such a conflict could have any material bearing upon the question in hand, we need not decide for the reason that we see no such conflict. True, subdivision (*a*) of Schedule 71 of the Act of 1915 page 420 levies this tax against the lender and requires a certificate that the same has been paid by the lender before the instrument can be recorded but the certificate in question is required only by the Probate Judge or his Clerk subdivision (*d*), Schedule 71. This simply means that the Probate Judge must collect the tax and so certify before recording the instrument but our statute does not preclude the lender from contracting with the borrower as to who shall pay the same and there is therefore no conflict between the State Law and (par.) 9 of Section 13 of the Federal Act, even if said last act requires this charge to be paid by the borrower and excludes the right of the lender to do so. In other words, there is nothing in the Alabama Statute in conflict with (par.) 9 of Section 13 of the Federal Act, or which prohibits the lender from including this charge in the preliminary expense for negotiating the mortgage loan, or from advancing the same under an agreement with the borrower as provided by said par. 9 of the Federal Act. The Alabama Statute simply means that this tax must be paid by the lender, the owner of the mortgage, when it is tendered for record and so certified by the Probate Judge or his Clerk before the same is recorded, but as to the source from which the lender gets the fee, the State is not concerned.

Sayre, Somerville, Gardner and Thomas J.J. concur.

McCLELLAN, *J.* (dissenting):

The judge of probate of Montgomery County refused to receive and file for record a mortgage by Ashley to secure a loan from the Federal Land Bank: this for the reason, alone, that the sum of $4.50 was not paid as exacted or imposed by schedule 71 of section 361 of Alabama's Revenue Law of 1919 (Gen. Acts of Ala., 1919, p. 420). This schedule of the Revenue Law provides that "no mortgage * * * shall be received for record unless" the privilege or license taxes stipulated therein have been paid "upon such instrument before the same shall be offered for record, * * *." It is further provided therein that these privilege or license taxes shall be "paid by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender." Manifestly, the "certificate" there prescribed is a certificate made by the lender or by some agent of the lender. The office of that certificate is to advise the judge of probate, the registration officer, of the fact that the lender has paid the privilege tax there exacted. Its design consists with the law's just-stated imposition of the tax upon the lender, excluding its exaction of the borrower.

The majority of this court declares, in response on rehearing, ante, that the "certificate" required at the time of filing for record, viz: that the tax "was paid by the lender," is a duty enjoined upon the judge of probate, the registration officer. This view is wholly erroneous. A reading of schedule 71 of the Revenue Law will readily disclose the mistake. The "certificate" required of the judge of probate is that prescribed by subdivision *a* of schedule 71 (Acts, 1919, pp. 420-1); and its function is to confine the payment of the privilege tax in question to one county only where the mortgage describes property situate in more than one county. That is the "certificate" to which reference is made in the penalty provisions of subdivision *h* of schedule 71 (Acts, 1919, pp. 422-3), and
25 not the "certificate" of lender-payment that must be presented when the instrument is filed for record. This certificate by the judge of probate enables the mortgagee to have the benefit of registration in the other counties in which some of the property is situate. This error becomes more important in its consequences when provisions of the Act of Congress creating the Federal Land Bank are considered.

The charge imposed upon mortgages, etc., by schedule 71 of the Alabama Revenue Law of 1919 is not an ad valorem tax; it is not a property tax; it is, however, a tax upon the exercise or enjoyment of the privilege, afforded by Alabama, of gaining the benefits of the State's registration statutes. Under the laws of Alabama, the payment by the lender of this tax is a condition precedent to the filing of mortgages, etc., for record; and, if the tax is not paid as schedule

71 requires, the benefits secured by registration are denied the
curity holder.

Can this tax be exacted of a Federal Land Bank as a condi
precedent to the filing for record of that bank's mortgage, ta
under the system provided by the "Federal Farm Loan Act"
U. S. Stat. at L., Part 1, pp. 360 et seq.)?

If only the local, State law was the controlling factor, no debat
question would be presented. The Act of Congress creating
institution, Federal Land Bank, is a law that must be obeyed.
deed, within the sphere of its positive, lawful authority it is supe
to the Alabama Revenue Law of 1919. If observance of the
bama Revenue Law of 1919 involves offense to or disobedienc
the Act of Congress creating this institution, no agent or office
the State should obey the State law, much less be compelled to d
Likewise with respect to the officers or agents of the Federal L
Bank, whose observance of and obedience to the Act of Congre
inescapably required. If there exists unavoidable inconsiste
between provisions of the local, State law and valid pr
26 ions of the Act of Congress, such provisions of the State
are invalid. To avert that consequence it is the judicial
to construe those provisions of the State law so as to harmonize
apparent conflict, if that may be reasonably done under the te
employed in the State law.

To exact this tax of the Federal Land Bank, under the Alab
Revenue Law of 1919, casts the State law into conflict, alternati
at least, with provisions of the Act of Congress creating the ins
tion, viz: provisions of section 26 (quoted below) or the 9th su
vision of section 13 of the Federal Farm Loan Act, to be herein
reproduced. Section 26 of the Federal Farm Loan Act (39 U
Stat. at L. p. 38), so far as presently material, provides:

"That every Federal land bank and every national farm loa
sociation, including the capital and reserve or surplus therein
the income derived therefrom, shall be exempt from Federal, S
municipal, and local taxation, except "taxes upon real estate h
purchased, or taken by said bank or association under the provis
of section eleven and section thirteen of this Act. First mortg
executed to Federal land banks, or joint stock land banks, and f
loan bonds issued under the provisions of this Act, shall be dee
and held to be instrumentalities of the Government of the Un
States, and as such they and the income derived therefrom shal
exempt from Federal, State, municipal, and local taxation."

That the Federal Land Bank and mortgages taken thereby
"instrumentalities" of the United States is not only inherently t
but is so declared by the Congress. The institution and its con
plated activities are public in nature, office and effect. The ins
tion is affected with no selfish or private design. It was not cre
for profit or for revenue purposes. With respect to such an ins
tion, such an instrumentality of the United States, the States are
only powerless to subject the Government's agency itself to taxa

but "the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested" in the United States.—Weston v. Charleston,
27 2 Peters, 449, 467; Nat. Bank, &c. v. Mayor, &c., 62 Ala. 284, 291-2-3. In creating the Federal Land Banks Congress has not only not permitted the States to subject them to taxation or to impose the burdens of taxation upon the results of their activities in taking security for loans made, but, to the contrary, Congress has declared, expressly, that mortgages given to these institutions shall be exempt from Federal, State, municipal, and local taxation.—Nat. Bank, &c. *v.* Mayor, &c., 62 Ala. 284, 293. The validity of this feature of the Federal Farm Loan Act has not been questioned. Its validity is not questionable. The exemption thus expressly declared by Congress is from "taxation" by any governmental authority, including the States. As respects mortgages taken under the system, the intent avowed is to forbid the exertion by the States, among other authorities, of the power of taxation. To read these provisions of section 26 as prescribing exemption from either a license tax based on the right to do business in Alabama or an ad valorem tax only is unjustifiably to restrict the effect of the plain terms of section 26. The nature of this governmental instrumentality and the public purpose it was designed to subserve contribute to confirm the view that the Congress entertained the particular intent to deny the application of the power of taxation to mortgages taken by the Federal Land Bank. It is conceded that the charge imposed by schedule 71 of the Alabama Revenue Law of 1919 is a privilege tax,—a tax upon the privilege of availing of the registration laws of Alabama—a tax that must be paid if a lender would receive the important advantages, the protection, the registration laws of the State afford. Being an exertion of the power of taxation, the State's charge is offensive to the provisions of section 26 (quoted ante) of the Federal Farm Loan Act which forbid the States and other authorities to subject its mortgages to taxation in any form or thru any method not excepted by other (presently unimportant) provisions of the Federal Farm Loan Act. The State's Reve-
28 nue Act (schedule 71) should not be so construed as to institute such a conflict with the Federal Act. As may be reasonably done, it should be read as not applying to mortgages taken by the Federal Land Bank, thereby bringing the State Law (schedule 71) into harmony with the superior authority of the Federal Act.

Furthermore: the Federal Land Bank's function is to lend money on the security of land-mortgages. Such a business cannot be safely conducted without the benefits, the protection, of the registration laws of this State. Indeed, without recourse to these registration laws the continuing primacy of the security taken for a loan on land in this State cannot be assured. Protection of the right and interest of a first-mortgagee is, in the absence of notice thereof otherwise, afforded alone thru the constructive notice that results from seasonable registration of the instrument in the proper county or counties.—Ala. Code, 1907, §§3368-3373. An unrecorded mortgage has not

the advantage of the rules of evidence provided by section 3374 of the Code. Aside from another consideration to be adverted to, the Federal Land Bank has not a fair or unembarrassed choice to pay or not to pay this privilege tax as a condition to the registration of its mortgage. The consequence to attend the Land Bank's declination to pay the privilege tax is to deny the bank-mortgagee measures of protection and remedy under Alabama's registration laws that would leave the Land Bank no alternative but to suspend its function of loaning money in Alabama. Hence, in this view, the imposition of the privilege tax is an illegal burden upon, an impediment to, the exercise of the Government's power and function under the Federal Farm Loan Act.—Weston v. Charleston, supra.

2. The Federal Land Bank is without power or authority to pay the privilege tax in question. In unmistakable terms the Alabama Revenue Law of 1919 (schedule 71, quoted ante) requires this tax to be paid by the lender. Section 13, ninth subdivision, of the Federal Farm Loan Act (39 Stat. at L. p. 373) provides:

29 "Sec. 13. That every Federal land bank shall have power, subject to the limitations and requirements of this Act—

"Ninth. To charge applicants for loans and borrowers, under rules and regulations promulgated by the Federal Farm Loan Board, reasonable fees not exceeding the actual cost of appraisal and determination of title. Legal fees and recording charges imposed by law in the State where the land to be mortgaged is located may also be included in the preliminary costs of negotiating mortgage loans. The borrower may pay such fees and charges or he may arrange with the Federal land bank making the loan to advance the same, in which case said expenses shall be made a part of the face of the loan and paid off in amortization payments. Such addition to the loan shall not be permitted to increase said loan above the limitations provided in section twelve."

The carefully guarded definitions of authority conferred on the Land Banks and the limitations with respect to the monetary elements of the debt for which mortgages may be taken (§§12, 13 and 14 of the Federal Farm Loan Act) affirmatively exclude the right or power of the Bank, the lender, itself to pay any charge or tax of the character in question, except, as the quoted subdivision provides, the Bank may "advance the same" to the "borrower" and include that sum in the mortgage debt. The Federal Act imposes upon the borrower from the Land Bank the payment of "legal fees and recording charges", except the Bank may lend the borrower the money to pay the "legal fees and recording charges", and make such advancement a part of the mortgage debt. These are of the "expenses" of the loan, and are made, expressly, obligations of the borrower. Manifestly, to observe the State law (schedule 71) would require the Land Bank, the lender, to pay that which the Federal Farm Loan Act requires the borrower to pay. Both laws cannot be

ed. In this particular, the State law must yield to the suprem-
of the Federal Farm Loan Act.
he deliverance in Pocahontas Co. v. Virginia, 113 Va. 108, is
out application to the materially different circumstances here
lved. No Act of Congress—containing provisions of the nature
effect of sections 26 and 13 (subd. 9) of the Federal Farm Loan
—was a factor of compelling influence in that cause. Likewise
with respect to the subject-matter of Attorney General Gar-
land's opinion, Vol. 18, Ops. of Atty. Gen. pp. 491-2.

The considerations stated lead to these conclusions: That
indicated feature of schedule 71 of the Alabama Revenue Law
919 should be construed to harmonize with the Federal Farm
n Act; that, when so construed, Alabama's Revenue Law of 1919
s not exact the payment by the Federal Land Bank of the privi-
tax in question as a condition precedent to the right to file Ash-
s mortgage for record; and that the judge of probate should be
pelled by mandamus to accept the instrument for recordation
nout the precedent exaction of the tax's payment.
therefore dissent from the denial of the relief sought by the
eral Land Bank, the appellee. I would award the writ prayed.

MILLER, *J.* [dissenting]:

'he Federal Farm Loan Act, U. S. Stat. at Large, Vol. 39, part 1,
ion 26, pp. 377, 380, provides:

First mortgages executed to Federal land banks * * * shall
deemed and held to be instrumentalities of the Government of
United States, and as such they are, and the income derived
refrom shall be, exempt from Federal, State, municipal and local
ation."

'nder this Act this mortgage to the Federal Land Bank is exempt
m Federal, State, municipal and local taxation; and it shall be
med and held to be an instrumentality of the Government of the
ited States.
The following property shall be exempt from an ad valorem taxa-
n under the revenue statute:

'All property, real and personal, of the United States. * * *
'All mortgages, together with the notes, debts and credits secured
reby on real and personal property, situated in this State, which
rtgages have been filed for record and the privilege tax paid
reon."

Section 2, Revenue Act 1919, Gen. Acts 1919, p. 283.

A mortgage on real estate, and the debt it secures are exempt from
y other taxation provided it has been filed for record and the
vilege tax has been paid thereon. Under the Federal statute this
rtgage is exempt from State, municipal and local taxation. If it
unrecorded it cannot be taxed by the State or county under the
deral Act. If it is recorded and pays the privilege tax it is clearly

exempt from any further taxation by the State or county or city. Does the Federal Act by exempting it (the mortgage) from State, municipal, and local taxation thereby include this "privilege tax"? Does the State Revenue Act by exempting all property of the United States from an ad valorem taxation, thereby exempt this mortgage from this "privilege tax"? Schedule 71 of Section 361, Revenue Act of 1919, Gen. Acts 1919, p. 420, declares in part: No mortgage which is given to secure the payment of any debt, which conveys real estate within this State, shall be received for record unless the "privilege or license tax" of "fifteen cents for each hundred dollars of such indebtedness or fractional part thereof secured by said mortgage" is paid "upon such instrument before the same shall be offered for record."

32 A tax of $4.50—a tax of fifteen cents on the $100 secured by it—must be paid on "this instrument," this mortgage, "before the same shall be offered for record;" unless it is exempt. Shall the mortgagee, the Federal Land Bank, pay a tax of $4.50 on this instrument before it can receive the benefit of the recordation laws of Alabama? This tax is on the mortgage, if it is recorded, if it receives the benefits of some of the statutes of Alabama. If it receives the benefits of our laws, the recording statutes, it must be taxed; the mortgage must be taxed; and the lender, the mortgagee—The Federal Land Bank—must pay the tax; and it is taxed according to the amount of the debt it secures, unless it is exempt. This revenue statute—schedule 71—states: "the privilege tax must be paid by the lender." This schedule 71 also provides: When "the amount of the tax required under this schedule" is paid on the mortgage, the judge of probate will certify it on the instrument and such instrument shall be admitted to record, "without the payment of any further tax thereon except the fee to the probate judge for recording" it. When the $4.50 tax is paid on the mortgage, it shall be admitted to record "without the payment of any further tax thereon." This schedule 71 also states:

"There shall be no ad valorem tax collected on any such instrument or the debt secured thereby which shall have paid the tax prescribed by this schedule, either State, county or municipal."

The payment of this tax of $4.50—fifteen cents per hundred dollars on the amount of the debt it secures—on this mortgage when recorded will exempt the mortgage and the debt from any direct ad valorem tax—State, county or municipal. A similar statute declaring this principle and form of taxation by classifying debts or solvent credits, fixing one rate on recorded mortgage debts and another rate on solvent credits unsecured by mortgages, and debts secured by unrecorded mortgages, has been upheld and approved by this Court. This Court, speaking through Justice de Graffenried, in State v. Ala. Fuel & Iron Co., 188 Ala. 511, said:

"While the legislature, in the exercise of that reasonable latitude with respect to the classification of properties for taxation, and in the exercise of its reasonable powers of exempting properties from taxa-

—powers which all well-considered cases concede it to possess—
had the undoubted right to require a privilege tax of all
mortgages, deeds of trust, and written evidences of contracts
of conditional sales, for their recordation, and to exempt such
ded instruments from an ad valorem tax, the imposition by the
lature of an ad valorem tax upon all solvent credits not included
ne above classification was not only not discriminatory, but it
in fact, an effort on the part of the legislature to meet the letter
the spirit of our Constitution, which intends, in so far as a
thy policy will permit, equality in taxation."

he probate judge receives five per cent commissions on and out
ne tax as his compensation for collecting and remitting it to the
er officials; the balance of this $4.50 tax will be divided between
State and County, two-thirds to the former and one-third to the
r.—Schedule 71, section 361, Revenue Act 1919, p. 421. This
dule 71 of section 361 of the Revenue Act of 1919, p. 420, also
ides:

When the property described in said instrument is situated
in different counties within this State, then the judge of probate
collects said taxes shall pay over the amount due the county
surer to the county treasurer of each of the different counties in
ch said property is situated, an amount of said taxes that would
n proportion to the value of the property therein as compared to
value of the whole property within this State described in said
rument."

t appears, if the mortgage is on property in different counties,
tax one-third (less commissions) belonging to the counties shall
prorated among the counties in which the property is located ac-
ding to the value of the property in each county, as compared to
value of the whole property in the mortgage. The tax is fixed
the face value of the debt secured by the mortgage, and the tax
ivided among the counties according to the value of the property
each county in the mortgage as compared to the value of the
ole property in the mortgage.

When a mortgage is recorded, embracing property in different
nties, the amount of the secured debt regulates the amount of the
; but the value of the land in each county in the mortgage de-
nines the division of the tax to the counties. This section 71 of
l Revenue Act of 1919, page 420 also, provides:

'If any part of the property embraced or described in any instru-
nt which is required under this schedule to pay a record privilege
is located without this State, the indebtedness upon which the
shall be paid for the privilege of recording such instrument shall
be that proportion of the indebtedness secured by the instru-
ment which the value of the property located in this State
bears to the whole property described in the instrument.
e State Tax Commission may ascertain the value of the whole

property, and of that part of it which is located within this State, for the purpose of ascertaining the amount of the indebtedness upon which said tax shall be paid."

When a mortgage is filed for record in this State, embracing property within and without the State, the tax is not based on the total amount of the mortgage debt. The State Tax Commission under rules fixed by the statute ascertain the value of the whole property in the mortgage and the value of that part of the property, located in Alabama, for the purpose of determining the proportion of the secured indebtedness upon which said tax shall be paid. The value of the whole property and the value of the property in Alabama in the mortgage aids and guides in prorating the amount of the secured debt and thus determines the amount of the tax to be collected on the mortgage debt.

These provisions in the statute indicate the tax of fifteen cents on each one hundred dollars of the face value of the debt secured by the mortgage, is in its very nature ad valorem. It is not unconstitutional as the property (recorded mortgage debt) is classified, and all of that class is taxed uniformly and equally,—State v. Ala. Fuel & Iron Co., 188 Ala. 511. And the rate, fifteen cents on each one hundred dollars of the mortgage debt, is less than the maximum rate fixed by the Constitution. Section 214 of the Constitution of 1901 reads:

"The legislature shall not have power to levy in any one year a greater rate of taxation than 65/100 of one per centum on the value of taxable property within this State."

The Constitution permits a maximum annual tax of 65/100 of one per cent on the value of taxable property. This mortgage debt is taxable property; it is taxed fifteen cents on each one hundred dollars of its full face value. A real estate mortgage debt is subject to this annual tax on its value, unless this registration tax on its face value is paid.—Sections 2 and 5 and Schedule 71, Acts 1919, p. 283.

This registration tax is a tax on the value of the property; it is on the face value of the amount of the mortgage debt; and the
35 mortgage debt is property. This registration tax is on the mortgage debt when the mortgage is recorded, and it is based on its value, the face value of the debt secured by it. The mortgagee of a real estate mortgage is forced by this law to file for record his mortgage and pay the registration tax on the face value of the debt secured by it, or to pay an annual tax on the assessed cash value of the mortgage debt. The former tax is small, and is paid only once during the life of the mortgage; and the latter tax is large and must be paid annually during the life of the mortgage.

This tax law is in the Revenue Act for revenue purposes, to raise revenue to be used for the public. It is not in the recordation statute for recording purposes to pay recording expenses. It is in no sense a fee or cost. It is called in name, "privilege or license tax." The court must look beyond the name to the substance of the statute for

the real purpose of it, and to determine its true intent. Its name may prove a misnomer.—26 R. C. L. p. 36, § 19, headnote 19 and 1; 1 L. R. A. (N. S.) 152 (State of Washington v. Case).

Deeds are not choses in action. They are not property that is made subject by statute to an ad valorem tax. This "privilege or license tax" for recording instruments does not apply to deeds. It does not apply to wills. Real estate mortgage debts are choses in action. They are personal property. They are subject to an ad valorem tax, if not recorded and the recording tax paid. This "privilege of license tax" for recording instruments applies to them. They are taxed according to the value of the property, the value of the debt, the full face value of the debt they secure, when presented for recordation. Chattel mortgages are the debts they secure, and conditional sales and the debts secured are choses in action; they are personal property, subject to an ad valorem tax, if not recorded and the recording tax paid, under this revenue statute. It appears this Revenue Act taxes as a "privilege or license" for being recorded only those instruments securing debts, which are choses in action; they are property and they are subject to an ad valorem tax, if not recorded. Is it a bona fide recordation "privilege or license
36 tax"? Is it a bona fide "privilege tax" or "license tax" to obtain the privileges secured by recording? If so, then why were not all instruments taxed by the revenue law that reap benefits from being recorded? Deeds and wills pay no privilege tax to be recorded. Just those instruments which are personal property, choses in action, subject to an annual direct ad valorem tax, are placed under the name of "privilege or license tax," and required to pay a small tax, if recorded, and a large tax, if not recorded. Is the name a misnomer? Does it not look like the legislature intended by this revenue statute to place a small ad valorem tax based on the full face value of the secured debts of these instruments, if recorded or to place a larger annual ad valorem tax on them, based on their assessed cash value, if not recorded. This Court in the case of State v. Ala. Fuel & Iron Co., 188 Ala. 487, in effect declared it could be done under our Constitution. It appears the legislature by this statute was following that opinion.

Ad valorem means literally "according to value"; as applied to the subject of taxation, it means "a tax or duty upon the value of the article or thing subject to taxation."—2 Corpus Juris p. 30.

It is true this law was first enacted in Alabama in 1903.—Gen. Acts 1903, p. 227. It is similar in many respects to the present revenue statute on that subject. In Barnes v. Maragne, 145 Ala. 313, this Court, by divided vote of four to three, wrote, on the subject of the Act of 1903:

"In fact it only provides for a privilege tax on recorded mortgages, once for the life of the mortgage, which is in no sense an ad valorem tax."

If this is a correct interpretation of the statute, then a mortgage debt can be taxed for the recordation of the mortgage at the will of the legislature, on the full face value of the secured debt, without

limitation as to the amount of the "privilege or license tax"; and the legislature can, if they so desire, also levy an ad valorem tax annually to the constitutional limit (§214 of the Constitution of 1901) on the same mortgage debt. We cannot approve of this interpretation of this statute. It is dangerous. It would permit mortgage debts to be taxed beyond the constitutional maximum.

37 The will of the legislature should be controlled by the Constitution; the taxes levied and collected should be within its limits, and no property should be taxed twice.

The case of Barnes v. Maragne, 145 Ala. 313, was modified and overruled in part by State v. Ala. Fuel & Iron Co., 188 Ala. 487.

In 26 R. C. L. p. 36, §19, headnote 1, we find this:

"A tax on mortgages, though purporting to be a registration fee, is really a tax on the mortgages themselves, and so is a property tax."

This tax on mortgages purports to be and is called a "privilege or license tax"; yet it really taxes each one hundred dollars secured by it fifteen cents. This is in reality a property tax. It gives you the privilege of the recordation statutes, and it gives you the privilege of exempting your secured debt from an annual ad valorem tax, if you record your mortgage and pay a small tax of fifteen cents on each one hundred dollars secured by it; yet, if you do not accept the privilege offered, present for record the mortgage and pay that small tax on its debt, you are met face to face with a real and larger tax—a direct annual ad valorem tax—on the assessed cash value of the mortgage debt. It purports to be a "privilege or license tax" but it is a tax on the mortgage debt, and is a property tax.

This mortgage of the Federal Land Bank is an instrumentality of the Federal Government, it is personal property of the United States, and it is exempt from this $4.50 tax by the Federal statute (Vol. 39 U. S. Stat. at Large, part 1, §26, pp. 377 & 380), and by the state revenue statute (§2, Gen. Acts 1919, p. 283).

38 Filed, Supreme Court of Alabama, May 26, 1922. Robt. F. Ligon, Clerk.

To the Honorable W. H. Taft, Chief Justice of the Supreme Court of the United States, and to the Associate Justices of the Court:

Federal Land Bank of New Orleans, the plaintiff in the cause shown in the foregoing record of proceedings in the Supreme Court of Alabama, shows by this the petition to this Honorable Court, that in the record, proceedings and decisions in the Supreme Court of the State of Alabama, the same being the highest court of said State in which a decision could be had in this suit, a manifest error has occurred, greatly to the damage of the said Federal Land Bank of New Orleans.

That, as appears in the record and proceedings, there was drawn in question; First, the right of the State of Alabama to levy a tax, for general revenue purposes for the State, of Fifteen Cents per Hundred Dollars or fraction thereof of the principal sum secured by a

ıortgage as required by Schedule 71 of the Act of the Legislature of labama, approved September 15, 1919, which was duly tendered nd offered to be recorded upon the Public Books of Mortgage Recrds of said State, in addition to the regular recording fees for makıg such record as fixed by the law of Alabama, which fees were duly ffered and tendered to be paid:

Second, the right of the State of Alabama to inhibit the petitioner o have its mortgages, duly taken in the course of its regular busiess, recorded upon the official record of mortgages kept by the State for the recording of mortgages for the purpose of giving notice f such claims and avoiding the risks and dangers of not having hem recorded as provided by law, unless the petitioner would pay o the recording officers, beyond and in addition to the ordinary and egal fees for doing the work of recording, which were tendered and ffered to be paid, a tax of Fifteen Cents per Hundred Dollars or fraction thereof the principal sum secured by such mortgages levied by the State for revenue purposes of said State as required by Schedule 71 of an Act of the Legislature of Alabama, approved September 15, 1919; all of which fully appears in the records and proceedings of the case and is specifically set forth in the assignment of errors filed herewith and hereunder.

39 Wherefore, petitioner prays that a writ of error be allowed, and that a transcript of the record, proceedings and papers upon which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States, at Washington, D. C., under the rules of such Court in such cases made and provided, and that the same may be by this Honorable Court inspected and corrected in accordance with law and justice.

W. A. GUNTER,
Solicitor.

I, John C. Anderson, Chief Justice of the Supreme Court of Alabama, having had submitted to me the foregoing Petition of the Federal Land Bank of New Orleans, for a writ of error from the Supreme Court of the United States as prayed for in said petition, to reverse the said judgment of the Supreme Court of Alabama against it, mentioned in said petition, and in connection therewith its assignment of errors and having considered and understood said petition and said assignment of errors, and regarding and taking both as sufficient in law, do hereby allow and order said Writ of Errors to be issued as prayed for, and that a certified transcript of the record and all proceedings in said case be forthwith transmitted to said Supreme Court of the United States, and it is further ordered that bond in the sum of Two Hundred and Fifty Dollars be given for the due prosecution of said Writ of Error and that a citation issue to the said D. W. Crossland, Judge of Probate, appellant, in said suit in the Supreme Court of this State and appellee in said Writ of Error proceeding, commanding him to be and appear within thirty days from the date hereof in the said Supreme Court of the

United States, to defend, if he so desires, against the said suit in s
Supreme Court of the United States, to be held at Washington, D.
on the second Monday of October, 1922.

This 26th day of May, 1922.

JNO. C. ANDERSON,
Chief Justice of the Supreme Court
of Alabama

40 Filed Supreme Court of Alabama May 26, 1922. Robt.
Ligon, Clerk.

Writ of Error.

In the Supreme Court of Alabama.

D. W. CROSSLAND, Judge of Probate, Appellant,

vs.

FEDERAL LAND BANK, Appellee.

The President of the United States to Honorable Judges of the
preme Court of Alabama, Greeting:

Whereas, in the record and proceeding and in the rendition
the judgment of the above entitled cause, shown by the record
proceedings above attached, which is now before you or some of y
between D. W. Crossland, Judge of Probate, appellant, and Fed
Land Bank of New Orleans, appellee. Your Court being the high
Court of said State having jurisdiction of the cause, there was dra
in question, the right of the State of Alabama, beyond the regu
and ordinary fees for recording as fixed by law, to tax the Fed
Land Bank of New Orleans for general purposes of revenue for s
State Fifteen Cents per Hundred Dollars and fraction thereof up
the amount of mortgages tendered by it, the said Federal Land Ba
to be recorded on the public records for mortgages provided by s
State; and whereas there is manifest error in said decision to
damage of the said Federal Land Bank of New Orleans, the p
tioner in error, and whereas we are willing that if this is erro
should be duly corrected, we command you, therefore, if judgm
be given therein, that you send under seal of your Court, the rec
and proceedings in said cause to the Supreme Court of
41 United States, together with this writ, within such time
may be necessary in order that you have the same at Wa
ington on the second Monday of October, 1922, that the record m
be then inspected by the Supreme Court of the United States to
then and there held in order that justice may be done.

Witness the Honorable W, H. Taft, Chief Justice of the Supreme Court, this the 26 day of May, 1922.

[Seal of the United States District Court, Middle District of Alabama.]

GEORGE STUART,
Clerk U. S. District Court,
Middle District of Alabama.

Appd.:
JNO. C. ANDERSON,
Chief Justice.

May 26th, '22.

42 Filed Supreme Court of Alabama May 26, 1922. Robt. F. Ligon, Clerk.

Assignment of Errors.

Supreme Court of Alabama.

D. W. CROSSLAND, Judge of Probate, Appellant,

vs.

FEDERAL LAND BANK, Appellee.

Comes the Federal Land Bank, the appellee in the above entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the writ of errors prayed for and allowed in said cause.

1.

That the Supreme Court of Alabama in overruling and reversing the decision of the lower court in said cause thereby violated the Constitution of the United States and the Statutes of the United States by permitting and allowing the State of Alabama to levy and collect taxes for revenue purposes on the business of the Federal Land Bank, under Schedule 71 of an Act of the Legislature of Alabama approved the 15th of September 1919. The said Supreme Court of the State holding said act of the Legislature to be valid whereas it was void so far as it authorized the collection of taxes on the business of the Federal Land Bank.

43 2.

That the said Supreme Court of Alabama held in said cause and its judgment therein, that the said Act of the Legislature shown in Schedule 71 of said Act approved 15th of September 1919, authorizing and requiring a tax beyond recording fees, of Fifteen Cents per

Hundred Dollars and fraction thereof of the amount of mortgag
taken in the business of the said Federal Land Bank of New Orlea
and tendered for registration under the laws of Alabama, was a vali
and subsisting law as to said tax, whereas it should have held sa
Act as to that matter void and should have affirmed instead of r
versing the decree of the lower court.

3.

That the said judgment of the Supreme Court of Alabama violat
the Constitution of the United States and the Statutes of the Unit
States under which the Federal Land Bank was organized and doi
business by sustaining the tax levied upon said Federal Land Ban
in controversy in this case.

4.

That said Supreme Court of Alabama should have affirmed th
judgment of the lower court holding said tax levy void instead
reversing said lower court and holding said tax valid.

Wherefore the said Federal Land Bank, your petitioner, pra
that said judgment be reversed and that the Supreme Court of Al
bama be ordered to enter a decree reversing its own decree and
affirm the decree of the lower court.

W. A. GUNTER,
Attorney for Federal Land Bank.

44. [Copy.]

Bond for Appeal to the Supreme Court of the United States.

Supreme Court of Alabama.

D. W. CROSSLAND, Judge of Probate, Appellant,

vs.

FEDERAL LAND BANK, Appellee.

Know all men by these presents that we, Federal Land Bank
New Orleans, and Ludlow Elmore, and W. F. Black, as sureties, a
held and firmly bound unto D. W. Crossland, Judge of Probate,
the full and just sum of Two Hundred and Fifty ($250.00) Dolla
to be paid to the said D. W. Crossland, his attorneys, successo
administrators, executors, or assigns, to which payment well a
truly to be made we bind ourselves, our successors, assigns, executo
and administrators, jointly and severally by these presents.

Signed and dated this the 26th day of May, A. D. 1922.

Whereas lately at a regular term of the Supreme Court of A
bama, sitting at Montgomery in said State, in a suit pending in s
court between D. W. Crossland, appellant, and Federal Land Ban

appellee, on the law docket of said court final judgment was rendered against the said Federal Land Bank reversing the judgment of the lower court in said suit and holding valid a statute of Alabama in said suit clamied to be void, and the said Federal Land Bank has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said D. W. Crossland, defendant in error, citing him to be and appear before the Supreme Court of the United States at the next term thereof after this date to be holden according to law at Washington, in the District of Columbia, within thirty days from the date hereof.

Now the condition of the said obligation is such that if the said Federal Land Bank of New Orleans shall prosecute its writ of error to effect and answer all damages and costs if it fails to make *his* plea good, then the above obligation to be void, else to remain in
45 full force and virtue.

FEDERAL LAND BANK OF NEW ORLEANS,
By LUDLOW ELMORE,
Its Atty. in Fact.
LUDLOW ELMORE.
W. F. BLACK.

Approved this the 26th day of May, A. D. 1922.

JNO. C. ANDERSON,
Chief Justice of the Supreme Court of Alabama.

46 Filed Supreme Court of Alabama May 26, 1922. Robt. F. Ligon, Clerk.

Citation.

Supreme Court of Alabama.

D. W. CROSSLAND, Judge of Probate, Ap-ellant,

v.

FEDERAL LAND BANK OF NEW ORLEANS, Appellee.

To D. W. Crossland, Judge of Probate, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the second Monday of October A. D. 1922, pursuant to an order allowing a Writ of Error filed and entered in the Clerk's Office of the Supreme Court of Alabama from the Supreme Court of the United States to the Supreme Court

of Alabama, in the above cause to reverse the judgment for th
pellant in said cause at the present term of said Supreme Cou
Alabama, in which you were the appellant and said Federal
Bank appellee, to show cause, if any there be, why the said judg
in favor of said appellant as shown in said Writ of Error and
ceedings thereof, should not be corrected and why justice shoul
be done to the parties in that behalf.

Witness the Honorable J. C. Anderson, Chief Justice of th
preme Court of Alabama, this 26th day of May, 1922.

JNO. C. ANDERSON,
Chief Justice of the Supreme Court
of Alaban

I hereby except service of foregoing and waive notice, June
1922.

HARWELL G. DAVIS,
Attorney General of Alabama and
Attorney for Defendant in Err

47 *Certificate of Transcript of Clerk of the Supreme Cou*
Alabama.

THE STATE OF ALABAMA,
Judicial Department:

The Supreme Court of Alabama, 3 Div., October Term 192

552.

D. W. CROSLAND, Judge of Probate, etc.,

VS.

FEDERAL LAND BANK.

Appeal from Montgomery Circuit Court.

THE STATE OF ALABAMA,
County of Montgomery:

I, Robert F. Ligon, Clerk of the Supreme Court of Alabam
hereby certify that the foregoing pages numbered from 1 to 4
clusive, contain a full, true, and correct copy of the record and
ceedings of said Supreme Court in the above stated cause, as the
appear and remain of record and on file in this office, and o
bond for prosecution of the Writ of Error, and contain also
following original documents and papers, self-identifying, in p
cution of said Writ of Error to the Supreme Court of the U
States: Petition for Writ of Error, and Order allowing same;

of Error; Assignments of Error; Citation, and Certificate of Transcript by Clerk of Supreme Court of Alabama.

Witness, Robert F. Ligon, Clerk of the Supreme Court of Alabama, at the Capitol, in the City of Montgomery, this the 8th day of June, A. D. 1922.

[Seal of the Supreme Court of Alabama.]

ROBERT F. LIGON,
Clerk of the Supreme Court of Alabama.

Endorsed on cover: File No. 28,978. Supreme Court, Alabama. Term No. 428. Federal Land Bank of New Orleans, plaintiff in error, vs. D. W. Crossland, judge of probate. Filed June 12th, 1922. File No. 28,978.

(6961)

Office Supreme Court, U. S.
FILED
JUN 12 1922
WM. R. STANSBURY
CLERK

No. 428

Supreme Court of the United States

October Term 1921-2

FEDERAL LAND BANK OF NEW ORLEANS,
Petitioner,

Against

D. W. CROSLAND,
JUDGE OF PROBATE, Etc.,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama.

Supreme Court of the United States

October Term 1921-2

FEDERAL LAND BANK OF NEW ORLEANS,
Petitioner,

Against

D. W. CROSLAND,
JUDGE OF PROBATE, Etc.,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Alabama.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of The United States.

Your petitioner, The Federal Land Bank of New Orleans, respectfully presents to this court this his petition for a writ of certiorari addressed to the Supreme Court of the State of Alabama, commanding said court and the clerk thereof to certify to this court the record and proceedings of the case in said court wherein your petitioner was appellee and said D. W. Crosland was appellant, together with its opinion therein for the review and determination of said cause by this court.

The reasons relied on for the issuance of said writ and upon which your petitioner believes that a writ ought to be issued, and which will be more fully stated hereafter may be summarized as follows:

First: The Supreme Court of the State of Alabama misunderstood and misinterpreted the rule and decision of this court in the case of McCulloch vs. Maryland, 4 Wheat., followed for more than a century, and over-

ruled and disobeyed the mandate of the statute of the United States under which petitioner was organized, forbidding the taxation by the State for revenue of the instrumentalities of the government in enforcing against petitioner the tax levied by the State of Fifteen Cents per Hundred Dollars or fraction thereof upon the principal sum secured by mortgages taken by petitioner in the regular course of its business and offered for recording on the mortgage books of the State beyond and in addition to the regular, ordinary and legitimate fees for recording as shown and required by Schedule 71 of an Act of the Legislature of Alabama approved September 15, 1919, all of which fully appears in the records and proceedings of the case in the said Supreme Court of Alabama wherein the said D. W. Crosland, Judge of Probate, etc., is appellant and your petitioner appellee and decided by the said Supreme Court of Alabama at its present term, and which is shown in the certified copy of said record and proceedings filed herewith.

Second: That your petitioner a corporation regularly organized and doing business in New Orleans under the statutes of the United States as an instrumentality of the Federal government, in the due course of its business received a mortgage to secure a loan of money in the State of Alabama and tendered said mortgage for recording upon the mortgage books kept for the County of Montgomery in said State of Alabama under the laws of Alabama, and tendered to the officer keeping said records, to-wit, the said Crosland, the regular, ordinary and legal fees for recording said mortgage, and that the said recording officer refused to receive and record petitioner's said mortgage unless and until it had paid to the said officer in addition to said recording fees a tax levied by the State under Schedule 71 of its revenue act approved the fifteenth of September, 1919, and required to be collected by said officer before accepting mortgages for recording; that thereupon peti-

tioner obtained a mandamus from the proper court in Alabama requiring the said officer to receive and record said mortgage and holding said tax of Fifteen Cents per Hundred Dollars levied as foresaid, to be void under the constitution and laws of the United States; that thereupon the said Crosland appealed to the Supreme Court of Alabama wherein the said case was duly heard at the June Term 1922 of said court, when the said court rendered a final decree and order in said cause reversing the decision of the said lower court and holding said levy of said Fifteen Cents per Hundred Dollars of said mortgage legal and valid and reversed the said decision of the lower court, commanding it to carry into effect said tax law of the State of Alabama against your petitioner; which judgment and decree petitioner avers was and is a denial of the immunity from said tax held by your petitioner under the constitution and laws of the United States.

Your petitioner avers that it duly applied for a rehearing in said cause and argued the case fully and at length, citing the said case of McCulloch vs. Maryland and the many authorities following it for a century, but that the same made no impression upon the said Supreme Court of Alabama which adhered to its said judgment against petitioner. Your petitioner in its brief accompanying this petition will more particularly elaborate upon the foregoing case.

Your petitioner presents herewith a certified copy of the entire record in said cause including the proceedings in the Supreme Court of the State of Alabama and the opinion of said court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this court, directed to the Supreme Court of the State of Alabama, sitting at Montgomery, Alabama, commanding the said court to certify and send to this court on day to be designated, a full and complete transcript of

the record and all proceedings of the said Supreme Court of the State of Alabama had in said cause. To the end that the said cause may be reviewed and determined by this honorable court as provided by law and that the said judgment of the Supreme Court of the State of Alabama be reversed by this honorable court and for such further relief as may seem proper. And your petitioner will ever pray.

W. A. GUNTER,
Montgomery, Ala.,
Counsel for Petitioner.

State of Alabama, Montgomery County.

W. A. Gunter being first duly sworn, on oath deposes and says that he is the counsel for petitioner, The Federal Land Bank of New Orleans; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said petition herein stated are true to the best of his knowledge and belief.

W. A. GUNTER,

Subscribed and sworn to before me this 7 day of June, 1922.

Notary Public in and for the State of Alabama,
Montgomery County.

I do hereby certify that I have carefully examined the foregoing petition for a writ of ceritorari and the al-

legations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this court.

W. A. GUNTER,
Counsel for Petitioner

FEDERAL LAND BANK OF NEW ORLEANS,
Petitioner,

v.

D. W. CROSLAND, JUDGE OF PROBATE,
Respondent,

SUPREME COURT OF THE UNITED STATES.

The clerk will enter my appearance as counsel for the Petitioner,

---

SUPREME COURT OF THE UNITED STATES

FEDERAL LAND BANK,
Petitioner.

vs.

D. W. CROSLAND, JUDGE OF PROBATE,
Respondent.

I, Harwell G .Davis, Attorney General of Alabama, of Montgomery, Alabama, Counsel for Respondent, D. W. Crosland, in the above case and in all its phases, hereby accept full service of notice of the day of submission of the Petition in the said case in the Supreme Court on Monday the 12th day of June, 1922, for a certiorari as prayed for in the petition in said case and

also acknowledge service of a copy of said petition, and waive all other or further notice, and consent that the submission of said petition for certiorari may be made to said Supreme Court of the United States on the second Monday of June, 1922. And further stipulate that the certified copies of the record filed in the Writ of Error feature of said case may be taken as the return of the Clerk in this the certiorari feature of the case.

HARWELL G. DAVIS,
Attorney General of Alabama.

This 27th day of May, 1922.

SUPREME COURT OF THE
UNITED STATES

October Term 1921-2

FEDERAL LAND BANK OF NEW ORLEANS,
Petitioner and Appellant,

vs.

D. W. CROSLAND, as JUDGE OF PROBATE
OF MONTGOMERY COUNTY, ALA.,
Respondent and Appellee.

Brief of Respondent on the petition for a Certiorari to the Supreme Court of Alabama

STATEMENT OF THE CASE

The petitioner is a Federal Land Bank, located and doing business under the Federal Statutes, at New Orleans, La. In the due course of business it took a mortgage on land to secure a loan to a citizen of Montgomery County, Alabama, and offered its mortgage and tendered the proper and regular fees for recording to the

Respondent, the proper officer, to be recorded as prescribed by law on the public record for mortgages.

The recording officer refused to accept the mortgage and the recording fees and record the mortgage unless petitioner would pay, in addition to such recording fees, a tax of fifteen cents per hundred dollars and any fraction thereof on the abount secured by the mortgage, in pursuance of a tax levy by the State on all mortgages, offered to be recorded, under Schedule 71 of Section 361 of the Revenue Law of 1919 (Acts 1919, p. 420) which is as follows:

> Schedule 71. MORTGAGES—(a) No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, and which conveys any real or personal property situated within this State, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to-wit: Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars, there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage, deed of trust, contract of conditional sale, or other instrument of like character, to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender.

The same Schedule 71 also contains this clause:

> There shall be no *ad valorem* tax collected on any such instrument, or the debt secured thereby which

shall have paid the tax prescribed by this schedule, either State, County or Municipal—

Acts 1919, p. 421.

The recording fees for recording mortgages are fixed by Code of Alabama, of 1907, Section 3720 in these words:

"Judges of Probate are entitled to the following fees for the following services * * * Recording wills * * * deeds, and all other instruments * * * required by law to be recorded, and not otherwise provided for, for each hundred words, $0.15."

The law of which Schedule 71 forms a part is styled: "An Act to provide for the general revenue of the State of Alabama;" and in Section 2 of said Act, amongst the list of exemptions from taxation, is the following:

"All mortgages together with the notes, debts and credits secured thereby on real or personal property situated in this State, which mortgages have been filed for record and the privilege tax paid thereon."

Acts 1919, p. 282 and 283.

On the refusal of the Judge of Probate to accept and record petitioner's mortgage until said privilege tax was paid, a mandamus was obtained from the Circuit Court requiring him to do so.

Thereupon an appeal was taken to the Supreme Court by the Judge of Probate, and the Supreme Court reversed the decree of the lower Court and held the Privilege Tax valid and that it must be paid.

And thereupon The Federal Land Bank obtained a Writ of Error from this court to correct said error of the Supreme Court, and the same time, fearing that possibly a mistake might be made as to the remedy, this application for a certiorari is made.

LAW POINTS

1. The Federal Agencies of the Goernment are by implication exempt from taxation for revenue by the states.

They are doubly exempt when there is a Federal Statute expressly exempting them from such taxation, as there is in this case.

McCulloch v. Maryland, 4 Wheat. 367; 4L. Ed. 579.

Arguments for Appellant in McCulloch case.

Annotation of McCulloch case, U. S. Reps. 4L. Ed. 870.

1 Rose's Notes to McCulloch case, U. S. Rep. 4L. Ed. 909.

Notes to 69 A. S. Reps. 39.

45 L. R. A. 737.

Recent decision U. S. S. Court, Sustaining Federal Bank Act, Advance Opinions, Pamphlet No. 10, p. 360.

2. An assessment for revenue by the State of a charge on a mortgage debt in the direct proportion of the amount secured by the mortgage when presented for recording, in addition to the regular fees for recording, is essentially a tax and not for the service of recording, and therefore must be authorized by a lawful power to tax in the ordinary manner for the general purpose of securing a revenue. And thus must stand as a general tax collected by the official tax collector.

8 Words & Phrases, "Tax," 6867 *et seq.*

4 Words & Phrases, 2 Edition, "Tax" 846 *et seq.*

Property taxes, such as those involved here, cannot be disguised and allowed under an ambush of words as being fees for work and labor done.

State of Washington v. Case, 1 L. R. A. (N. S.) 153 and note is a full authority to the point.

ARGUMENT

The only possible point in this case is, whether or not the tax of fifteen cents per one hundred dollars and fraction thereof, on the amount secured by a mortgage tendered for record, in addition to the regular fees for recording, may be levied or charged against petitioner by the State, under any sort of guise or ambush of words, on or against the mortgage in this case.

It is too palpable for argument that any charge against mortgages tendered for record, beyond and in addition to the usual current and lawful fees for recording, is a tax on property and not for the work and labor done in recording to cover all expenses incident to that work and convenience.

The power to tax in the State is the power to destroy, as pointed out in the McCulloch case more than a century ago. So the power to tax at the rate of fifteen cents per hundred dollars carries the right to tax to any extent thought desirable by the taxing power. And thus if the power existed in any disguise whatever the State possessing it could destroy the entire government of the United States.

The case falls directly within the rule of McCulloch v. Maryland, 4 Wheat., *supra*, and within the direct and express provision of the statute under which the Land Bank is organized.

The Sections 21 and 22 of the statute under which the Federal Land Bank was organized expressly exempt from taxation by the State the mortgage in this case. The language of Section 22 contains the prohibition in these words:

> "First mortgages executed to Federal Land Land Banks * * * shall be deemed and held to be instrumentalities of the government of the United States, and as such they, and the income derived

therefrom, shall be exempt from Federal, State, Municipal and local taxation."

United States Stat. at Large, Vol. 39, para. 1, pages 377, 378, 380.

It is idle, therefore, to contend that the tax in this case is not a tax on the debt represented and secured by the mortgage, and thus directly in the teeth of McCulloch v. Maryland, 4 Wheat. *supra*, and of the Federal statute just referred to. And we therefore refrain from arguing a matter so obvious to ordinary persons, to say nothing about cultivated legal minds. We do, however, refer to the very clear opinion of Judge Miller of the Alabama Supreme Court, who dissented from the view of the majority.

W. A. Gunter

Attorney for Petitioner.

INDEX.

Page.

Statement of case 1
The facts 2
Assignments of error 3
Argument:
I. The Federal Land Banks are agencies of the Government, charged with certain administrative duties, and as such are exempt from all taxation 5
II. The charge sought to be enforced is nothing but a tax pure and simple 6
III. In an unbroken line of decisions, this Court has held that instrumentalities of the Federal Government are immune from State taxation, regulation, or interference 12
IV. The failure to record a mortgage in Alabama forfeits all protection 17
V. The conflict between the State statute and the Federal statute 19

CITATIONS.

Cases:
Almy v. *State of California*, 24 How. 52 16
Brown v. *Maryland*, 12 Wheat. 262 16
City of Newton v. *Atkinson*, 75 Kan. 151 18
Covington City Natl. Bk. v. *Covington*, 21 Fed. 481 12
Davidson v. *Gorman*, 40 Minn. 232 10
Dobbins v. *Commissioners*, 16 Pet. 425 17
Gillespie v. *State of Oklahoma*, 257 U. S. 501 ..... 14, 15
Leloup v. *Mobile*, 127 U. S. 640 17
McCulloch v. *Maryland*, 4 Wheat. 433 ..... 5, 13
Mutual Benefit Ins. Co. v. *County of Martin*, 104 Minn. 179 8
Osborn v. *The Bank*, 9 Wheat. 738 13
Owensboro Bank v. *Owensboro*, 173 U. S. 664 12
People v. *Trust Co. of America*, 205 N. Y. 98 8
Philadelphia Steamship Co. v. *Philadelphia*, 157 U. S. 429 17
Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429 17
San Francisco v. *Crocker-Woolworth Natl. Bank*, 92 Fed. 273 12
Smith v. *Kansas City Title Co.*, 255 U. S. 180 5
State v. *Alabama Fuel & Iron Co.*, 188 Ala. 506 ..... 7, 18
Union Trust Co. v. *Detroit Council*, 170 Mich. 692 9
Weston v. *Charleston*, 2 Pet. 729 17
Wheeler v. *Weightman*, 96 Kans. 69 ..... 9, 10, 18
Statutes: Code of Alabama, sections 3373, 3383 18
Appendix: Schedule 71 of General Statutes of Alabama, section 361, page 420 21

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FEDERAL LAND BANK OF NEW ORLEANS, plaintiff in error, *v.* D. W. CROSSLAND, JUDGE OF PROBATE. } No. 428.

ON WRIT OF ERROR AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF ON BEHALF OF PETITIONER AND PLAINTIFF IN ERROR.

STATEMENT.

The petition for writ of certiorari and the writ of error seek the reversal of the judgment of the Supreme Court of Alabama, which reversed the judgment of the Circuit Court of Montgomery County, Alabama.

The actual question presented is whether the Federal Land Bank of New Orleans is subject to a tax imposed under Schedule 71 of the Revenue Statute of 1919 of the State of Alabama.

THE FACTS.

The Federal Land Bank of New Orleans, created under the Federal Farm Loan Act, in the course of its business took a mortgage executed to it by J. M. Ashley and wife on lands situated in Montgomery, Alabama; this to secure a loan of $3,000, made on November 15, 1919. This mortgage was tendered to the judge of probate of Montgomery County, the respondent, for the purpose of recordation upon the book of mortgages kept for that purpose.

With this mortgage was tendered the lawful fee of $3.25, the actual cost of recording the mortgage; but the tender was refused, unless an additional fee of 15 cents per hundred dollars and fraction thereof was paid, as required by Schedule 71 of section 361 of the Revenue Act of 1919. This amount the Federal Land Bank refused to pay, and applied for a mandamus to the Circuit Court of Montgomery County. A mandamus was granted; and the respondent appealed to the Supreme Court of the State of Alabama.

In its original opinion, the Supreme Court of Alabama sustained the judgment of the lower court, but on rehearing reversed its decision. On a second rehearing applied for by the Federal Land Bank, the Supreme Court refused relief, holding that the tax was lawful and should be collected.

Thereupon, on application of plaintiff in error, the Supreme Court of Alabama granted this writ of error; and in addition thereto, the jurisdiction of this court was invoked by petition for a writ of certiorari,

which petition has been referred by this court to the merits of the case. Brief in support of the petition for writ of certiorari has previously been submitted to the court; and it is respectfully suggested that, if there should be any question of the method by which the case is brought before the court, the writ of certiorari be granted. The right to tax agencies of the Government is of such importance as to warrant this suggestion.

ASSIGNMENTS OF ERROR.

1.

That the Supreme Court of Alabama in overruling and reversing the decision of the lower court in said cause thereby violated the Constitution of the United States and the Statutes of the United States by permitting and allowing the State of Alabama to levy and collect taxes for revenue purposes on the business of the Federal Land Bank, under Schedule 71 of an Act of the Legislature of Alabama approved the 15th of September, 1919. The said Supreme Court of the State holding said act of the Legislature to be valid whereas it was void so far as it authorized the collection of taxes on the business of the Federal Land Bank.

2.

That the said Supreme Court of Alabama held in said cause and its judgment therein, that the said Act of the Legislature shown in Schedule 71 of said Act approved 15th of September, 1919, authorizing

and requiring a tax beyond recording fees, of Fif
teen Cents (15¢) per hundred dollars and fractio
thereof of the amount of mortgages taken in th
business of the said Federal Land Bank of Ne
Orleans and tendered for registration under the law
of Alabama, was a valid and subsisting law as t
said tax, whereas it should have held said Act as t
that matter void and should have affirmed, instea
of reversing, the decree of the lower court.

3.

That the said judgment of the Supreme Court o
Alabama violates the Constitution of the Unite
States and the Statutes of the United States unde
which the Federal Land Bank was organized an
doing business by sustaining the tax levied upo
said Federal Land Bank in controversy in this case

4.

The said Supreme Court of Alabama should hav
affirmed the judgment of the lower court holdin
said tax levy void, instead of reversing said lowe
court and holding said tax valid.

The Alabama statute under consideration is printe
as an appendix to this brief.

ARGUMENT.

I.

The Federal Land Banks are agencies of the Government, charged with certain administrative duties, and as such are exempt from all taxation.

That Congress has the authority to create corporations through which the Government might operate is no longer an open question. That when such corporate agency is created it is entitled to immunity from State taxation or regulation, within the powers conferred by Congress, has been settled since the days of *McCulloch* v. *Maryland* and the unbroken line of decisions following.

The authority of Congress to create the Federal Land Banks has been affirmed by this court in the case of *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, where the court said:

> We therefore conclude that the creation of these banks and the guaranty of authority to them to act for the Government as depositories of public moneys and purchasers of Government bonds, brings them within the creative power of Congress. Although it may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farms secured at low rates of interest, this does not destroy the validity of these enactments, any more than the general banking powers destroyed the authority of Congress to create the United States Bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create these institutions.

And, dealing with the question of tax exemption, the court said:

> Tax exemption is the real issue sought to be settled here. Deciding, as we do, that these institutions have been created by Congress, with the exercise of its legitimate authority, we think the power to make the securities hereunder involved tax-exempt necessarily follows. This was settled in *McCulloch* v. *Maryland* and *Osborn* v. *The Bank*.

The Federal Farm Loan Act (39 Stat., Part 1, pp. 377–380, sec. 26) provides:

> First mortgages executed to Federal Land Banks shall be deemed and held to be instrumentalities of the Government of the United States, and as such they are, and the income derived therefrom shall be, exempt from Federal, State, municipal, and local taxation.

From this it will be seen that the question of exemption from taxation, and the legality of that exemption, has been decided by this court, and the question is no longer an open one.

II.

The charge sought to be enforced is nothing but a tax pure and simple.

Under the general exemption from taxation granted the Federal Land Banks, and approved by this court in the case of *Smith* v. *Kansas City Title Co.*, if the charge sought to be imposed in this case is a tax, then of necessity the right must be denied.

The State of Alabama claims that it is a charge for the privilege of using its public records. The bank claims that it is nothing but a tax, no matter by what name it is called, and that the substance, not the shadow, must and will be sought.

Act No. 328 of 1919, under which the charge is levied, is entitled, "An Act to provide for the general revenues of the State of Alabama." From the excerpts from the statute printed in the appendix it will be noted that the charge sought to be collected in no way goes toward the administration of the office, but goes into the general fund of the State of Alabama, less such proportion as goes to the county. There is no question of fact involved in this case, as the record clearly demonstrates that there are two charges in connection with mortgages: one is the charge for the maintenance of the office, which in this case amounts to $3.25; and the other is the charge which goes into the general fund under the statute providing "for the general revenues of the State of Alabama."

This statute has been interpreted but once by the Supreme Court of Alabama, and that is in the case of *State* v. *Alabama Fuel & Iron Co.*, 188 Ala. 506. And while the court in that case held that it was not an ad valorem tax, at the same time a reading of the decision will suggest that there was no doubt in the mind of the court that it was an actual tax, no matter under what name it was imposed.

This statute is in no sense novel to the State of Alabama, but has been the subject of interpretation by the highest courts of other States. The statute was patterned after the Laws of New York of 1906. The Legislature of New York frankly designated the imposition as a "tax" and "a tax on mortgages."

In the case of *People* v. *Trust Co. of America*, 205 N. Y. 98, the court in interpreting the statute said:

> It is intended to levy, and in unmistakable terms did levy, a tax on mortgages as property, and left no room to interpret its action as directed merely towards the civil privilege of placing mortgages on record.

The State of Minnesota passed the same character of statute. In the case of *Mutual Benefit Ins. Co.* v. *County of Martin*, 104 Minn. 179, the court said:

> There were good and sufficient reasons why special methods should be devised for taxation of this kind of property.

Almost a similar statute had been passed by the State of Michigan, where the court said:

> The history of the adoption of this act is a matter of common knowledge. It is well claimed by relator that mortgages and like instruments had been concealed from assessing officers, by putting them in the name of non-residents, withholding them from record, and other familiar methods; and it is urged that, if a special tax should be imposed upon these instruments when they were recorded and their foreclosure made dependent upon their having been recorded * * * there would be an inducement to disclose mortgages to

> the assessing officer, rather than hide them as heretofore. With this end in view, the act was passed. *Union Trust Co.* v. *Detroit Council*, 170 Mich. 692, 696.

An attempt to impose a tax of this character in the State of Kansas was declared unconstitutional by the court in the case of *Wheeler* v. *Weightman*, 96 Kans. 69, 70, where the court said:

> The distinction, however, evidently referred merely to the method of apportionment; because the Legislature of New York rested under no delusion respecting the character of the act of 1906. It intended to levy, and in unmistakable terms did levy, a tax on mortgages as property, and left no room to interpret its action as directed merely toward the civil privilege of placing mortgages on record.

From this, it will be seen that in the States of the Union where this character of charge has been imposed, the courts have invariably held that it is a tax pure and simple. And to this must be added the fact that the Supreme Court of Alabama had no difficulty in arriving at the same conclusion in its original opinion, using these words:

> The mortgage is an instrumentality of the Government. It and the debt it secures are property. This revenue act taxes mortgages filed for recordation, according to the face value of the amount of the debt secured by it. This is, in nature, an ad valorem tax on the property. It was, therefore, exempt from such taxation, under section 2 of the State Revenue Act of 1919, page 283, as it is the property of the United States.

And again, the court found itself in complete harmony with the jurisprudence of the other States, when in its original opinion it stated:

> Ad valorem means, literally, "according to value," as applied to the subject of taxation, which means a tax or duty upon the value of the article or thing subject to taxation.

In its opinion on rehearing, the court does not attempt to reconcile this emphatic opinion, but uses these words:

> The tax * * * is mentioned as a privilege or license tax * * *. It is in no sense an ad valorem or direct tax.

In *Davidson* v. *Gorman*, 40 Minn. 232, the court held:

> But the sums required by this act to be paid into the county treasury must be regarded as taxes in the ordinary sense of that word, and as it is used in the constitution. They are not in any proper sense fees or costs assessed impartially, or with regard to the expense occasioned or services performed. The amounts are regulated wholly but arbitrarily with regard to the value of the estate. They have no proximate relation to the amount of compensation to be paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may become necessary to the proceedings.

Again reverting to *Wheeler* v. *Weightman*, 96 Kansas, 69, the court uses these words:

> The tax is a revenue measure, and the tribute levied is a tax.

In the opinion on rehearing, the Supreme Court uses these words:

> It is true the Federal Farm Act declared the mortgage in question to be an instrumentality of the Government, and that same shall be exempt from Federal, State, municipal, and local taxation; but we think that exemption refers to the property or ad valorem tax, and not the tax in question. In other words, we can not conceive an attempt on the part of Congress to authorize this appellee to use the records of the respective States for the record of its mortgages and escape the record or privilege tax exacted of all others.

No one has disputed the payment of the actual amount necessary to place the mortgage on record. Confusion only becomes worse confounded when the words "record" and "privilege" are used together and not separately. The charge for recording an instrument comes under the ministerial and administrative functions; the charge referred to by the Supreme Court of Alabama, "as mentioned as a privilege tax" arises from the revenue act designed to create revenue to be used for the general expenses of the State. There is a vast difference between causing one to contribute his part to the clerical administration of the office, to the end that the peculiar business or function in which one is engaged shall pay its part in its maintenance and support, and the requirement of payments under a revenue statute which had borrowed a name and not altered the substance. And, incidentally, there is a vast

difference between payment of a cost for recordation of an instrument in an administrative office, and the payment of an amount which is divided by the State with one of its counties. And in the opinion of Attorney General Garland which the court relied on, it will be found that the sole question there involved was the payment of an actual fee for the actual cost of recording an instrument in an administrative office.

III.

In an unbroken line of decisions, this court has held that instrumentalities of the Federal Government are immune from State taxation, regulation, or interference.

The previous decisions on this subject, in so far as banks are affected, have necessarily involved the National Banks. It might be well to state that the exemptions from taxation granted under the Federal Farm Loan Act and the exemptions to National Banks are identical in terms; and the principle has been universally accepted that:

> The only concession Congress has made to the States in this respect is to allow the taxation of shares in the national banks and permit their real estate to be taxed.

For authorities, see—

Owensboro Bank v. *Owensboro*, 173 U. S. 664.

San Francisco v. *Crocker-Woolworth National Bank*, 92 Fed. 273.

Covington City Natl. Bank v. *Covington*, 21 Fed. 281.

And to these could be added many other decisions ut for the well-accepted principle.

The court will therefore see how the courts have reated any attempt at indirect taxation of National Banks, their investments, securities, or operations; nd because the same principles are involved, it is uggested that the same decisions negative the right f the State to proceed by indirect taxation against he mortgages of the Federal Land Bank.

Necessarily, every case of this character involving axation requires a reference to these foundation tones of law, *McCulloch* v. *Maryland* and *Osborn* v. *The Bank*. To quote from these decisions would ppear superfluous; but quotations from the opinions nay be pardoned because of their peculiar applica- ion to this case.

In *McCulloch* v. *Maryland*, the Chief Justice said:

> The attempt to use it on means employed by the Government of the Union in pursuance of the Constitution, is itself an abuse, because it is a usurpation of a power which the people of a single State can not give. We find, then, on just theory a total failure of this original right to tax the means employed by the Government of the Union for the execution of its powers. The right never existed; and the question whether it has been surrendered can not arise.

And again, on page 432, he said:

> If the State may tax one instrument employed by the Government in the execution of its powers, then they may tax any and every other instrument.

And in this connection may be remembered this utterance:

> The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution powers vested in the general Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

In a recent decision of this court (*Gillespie* v. *State of Oklahoma*, 257 U. S. 501), the court said (p. 504):

> It is agreed that the lessee was an instrumentality of the United States in carrying out duties to the Indians that it had assumed. * * * A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.

So it might be suggested that a tax upon the recording of mortgages, which are the instrumentalities of the United States, is a tax upon the power of the United States to create such instrumentalities, and could be used to destroy the power to create them. And quoting further from the case of *Gillespie* v. *Oklahoma*, we find where the court said (p. 506):

> And, stopping short of theoretical possibilities, a tax upon such profit is a direct hamper upon the efforts of the United States to make the best terms that it can for its wards.

And so also, the recording tax on these mortgages is a direct hamper upon the efforts of the United States to carry out the mandate of Congress, under its conception of its duty to the agricultural interests, and the pledge that money should be loaned at the lowest possible rates.

The court in the case of *Gillespie* v. *Oklahoma* also announced this principle (p. 505):

> The criterion of interference by the States with interstate commerce is one of degree, whereas in the case of Federal instrumentalities * * * the rule is absolute in form, and, at least, stricter in substance.

The truth of the matter is that there can be no such thing as "reasonable regulation" by a State of a Federal agency or operation. To concede such power in the State would be to deny the complete sovereignty of the Federal Government in discharge of its constitutional functions.

The opinion of the Supreme Court of Alabama would indicate that, because the tax "is mentioned as a 'privilege tax,'" its imposition is justified.

This presents the question as to whether one can do indirectly what can not be done directly. If the State of Alabama has a right to impose a tax of 15 cents per $100, then it has a right to double that tax, or impose any amount that it sees fit; the question of reasonableness will not enter; the sole question is one of right.

And this presents the precise question as to whether taxes can be imposed indirectly when for-

bidden to be imposed directly. The answer is, of course, obvious; and is to be found in *Brown* v. *Maryland*, 12 Wheat. 419, where the court said.

> It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself.

The court further said:

> The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power of regulating commerce. We admit this power to be sacred; but we can not admit that it may be used so as to obstruct the free course of the power given to Congress * * *. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme.

In the case of *Almy* v. *State of California*, 24 How. 52, the court said:

> In the case now before the court, the intention to tax the export of gold and silver in the form of a tax on a bill of lading is too plain to be mistaken.

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, the court said:

> If it be true that by varying forms the substance can be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each State.

But constitutional provisions can not thus be evaded; it is the substance and not the form that controls, as has, indeed, been established by repeated decisions of this court: In *Weston* v. *Charleston*, 2 Pet. 729; in *Dobbins* v. *Commissioners*, 16 Pet. 425; in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; and in *Leloup* v. *Mobile*, 127 U. S. 640.

IV.

The failure to record a mortgage in Alabama forfeits all protection.

The Supreme Court of Alabama in its opinion, at page 17 of the record, states:

> We repeat that the payment of this tax in question is purely voluntary on the part of the appellee, as its mortgage can not be taxed unless it desires to place it upon the public records.

A mere inspection of the law of Alabama carries the conviction that an unrecorded mortgage is in no sense effective as a mortgage, and is not any better than a due bill. Of course, it is good as between the parties, but as to third parties it has absolutely no effect.

The Code of Alabama, section 3373, provides:

> Recording in the proper office of conveyance of property which may be legally admitted t record operates as a notice of the contents o such conveyances, without any acknowledge ment or probate thereof as required by law.

Section 3383 of the Code provides:

> All conveyances of real property, deeds mortgages, or instruments in the nature o mortgages, to secure any debts are inopera tive and void as to purchasers for a valuabl consideration, mortgage or judgment creditor without notice, unless the same have been re corded before accrual of the rights of such purchasers, mortgage, or judgment creditors

Therefore, it will be noted that section 3383 make it imperative to record if one is to preserve his se curity. Therefore, recordation is not voluntary bu is forced. To give one the option of doing or no doing something and then penalize one for not doing it destroys the option.

In *State* v. *Alabama Fuel & Oil Co.*, 188 Ala. 506 the court said:

> There is also a distinct line of cleavage be tween debts which are secured by recorded mortgages and those which are not so secured

It would appear, therefore, that there is a conflict between decisions of the court, and that the court itself has expressed the opinion as to the invalidity of an unrecorded mortgage.

In *Wheeler* v. *Weightman*, 96 Kan. 69, in considering the case of the *City of Newton* v. *Atkinson*, 75 Kansas 151, the court said:

The city levied a license fee on merchants, measured by the value of the stock of goods carried. Atkinson could pay the fee and enjoy the privilege of following his occupation as a merchant. He could reduce his stock and so reduce the amount of his fee; and he could dispose of his stock and so avoid the payment of the fee altogether. But if the city had penalized these avenues of escape in such a way that it would have been utterly disastrous to turn to them, it would be nonsense to say if he paid the fee that he exercised a voluntary choice in order that he might enjoy the privilege of merchandising; he would be paying an enforced contribution according to the value of the stock of goods; and because it lacked even the shadow of a privilege to rest upon, the contribution would be a pure property tax.

V.

The conflict between the State statute and the Federal statute.

The Alabama statute demands that the so-called privilege tax be paid by the lender. The Federal Farm Loan statute prohibits the payment of any charge by other than the borrower. The court in its decision in disposing of this point says that this may be the subject of negotiation. The bank is an agency of the Government; its mission is to serve; its officers are sworn officers; it is under the control of the Federal Farm Loan Board. It could not resort to subterfuge if it would, and it would not resort to subterfuge if it could.

The mandate of the Federal statute is absolutely plain; and the question of conflict between the State and Federal statutes is apparent; and to use the words of this court—

> In discussing these questions, the conflicting powers of the General and State Governments must be brought into view, and the supremacy of the laws, when they are in opposition, must be settled.

And then to this can be applied the acid test announced by this court:

> When this happens, that which is not supreme must yield to that which is supreme.

It is respectfully suggested that the decision be reversed.

JAMES M. BECK,
Solicitor General.
WILLIAM C. DUFOUR,
JOHN ST. PAUL, JR.,
Attorneys for Federal Land Bank of New Orleans.

FEBRUARY, 1923.

Appendix.

EXTRACTS FROM GENERAL ACTS OF ALABAMA OF 1919, PAGE 420, SECTION 361.

Schedule 71. Mortgages: (*a*) No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, and which conveys any real or personal property situated within this State or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to wit:

Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars, there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars, there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage, deed of trust, contract of conditional sale, or other instrument of like character to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender.

(*b*) That when any deed is filed for record which recites that part of the purchase money is unpaid, such deed to the extent of such unpaid balance shall be held and treated as a mortgage, and the mortgage tax shall be collected by the judge of probate in addition to the tax for recording the instrument as a deed before recording the same, unless said balance

of purchase money shall be secured by a mortgage
deed of trust which has already been filed for recor
and the tax thereon paid, and the fact of such pri
payment shall be endorsed on the deed. When an
such deed is recorded and the tax thereon is pai
and thereafter a mortgage securing the debt is file
for record, the same shall be admitted to recor
without the payment of the mortgage tax and th
fact of such prior payment shall be endorsed on th
deed.

(*c*) The privilege taxes required by law to be pai
on mortgages, deeds of trust, and similar instrumen
shall not be required on or for the filing of any suc
instrument, providing additional or substitute
security for any indebtedness secured by an instru
ment previously filed, upon the filing of which th
taxes provided by law have been paid or which wa
filed at a time when no such privilege taxes wer
required by law, provided the secured indebtednes
remains unchanged in amount and in time
maturity.

(*d*) Upon the filing for record of such mortgage
deed of trust, contract of conditional sale, or othe
instrument of like character, the person to whom th
same shall be made payable, or his agent, shall pre
sent the said instrument to the judge of probate,
the county in which the property conveyed thereby
or any part thereof is situated, and shall pay to th
probate judge the amount of the tax required unde
this schedule to be paid upon such mortgage, deed
trust, contract of conditional sale, or other instru
ment of like character, and upon such payment th
probate judge, or his clerk, shall certify on sai
mortgage, deed of trust, contract of conditional sal
or other instrument of like character the fact tha

the said tax has been paid, and when so certified by the probate judge or his clerk, such instrument shall be admitted to record in any county wherein any of the property mentioned in said instrument is situated without the payment of any further tax thereon, except the fee to the probate judge for recording such instrument, and such certificate of the probate judge shall be recorded by said probate judge when such instrument is recorded. The tax herein provided for shall be paid upon all contracts for the sale of real or personal property, whether the same be in the nature of a conditional sale or a bond for title, and no such contract shall be received for record until such tax shall have been paid.

(*e*) When the time for the payment of the indebtedness secured by any such mortgage, deed of trust, contract of conditional sale, or other instrument in the nature of a mortgage is extended or renewed, and the extension or renewal contract is offered for record, the tax required in this schedule shall be paid on the amount of indebtedness so extended or renewed; and the same shall be governed in all respects by the provisions of this subdivision. There shall be no ad valorem tax collected on any such instrument, or the debt secured thereby which shall have paid the tax prescribed by this schedule, either State, county, or municipal.

(*f*) Of the taxes collected by the probate judge under this schedule, there shall be paid to the county treasurer of the county in which such taxes are collected one-third of the amount collected by him, to be accounted for by him, and the remaining two-thirds of said amount collected to the State treasury. The Probate Judge shall receive five per cent of the amount collected by him as compensation for his

services in collecting said money, and certifying said instrument, said five per cent to be retained by him out of the moneys collected by him under this schedule; but when the property described in said instrument is situated within different counties within this State, then the judge of probate who collects said taxes shall pay over the amount due the county treasurer to the county treasurer of each of the different counties in which said property is situated an amount of said taxes that would be in proportion to the value of the property therein as compared to the value of the whole property within this State described in said instrument.

(*g*) If any part of the property embraced or described in any instrument which is required under this schedule to pay a record privilege tax is located without this State, the indebtedness upon which the tax shall be paid for the privilege of recording such instrument shall be that proportion of the indebtedness secured by the instrument which the value of the property located in this State bears to the whole property described in said instrument. The State Tax Commission may ascertain the value of the whole property, and of that part of it which is located within this State, for the purpose of ascertaining the amount of the indebtedness upon which said tax shall be paid. And the value of that part of the property located within this State and the amount of the indebtedness upon which such tax shall be paid shall be ascertained in the following manner: First, the owner of any such instrument, or his agent, or attorney, may petition the State Tax Commission to ascertain the value of the whole property, and of that part of which is located within this State, and the amount of the indebtedness

pon which such tax shall be paid and the said tax
ommission, after hearing such evidence as may be
ffered, shall fix and determine the value of that
art of the property located within this State and
ie amount of the indebtedness upon which the tax
iall be paid and shall endorse its findings on such
istrument and upon the presentation of said in-
rument, with such endorsements, to the probate
dge of county in which any part of the property is
cated, such instrument, upon the payment of the
x upon the amount of such indebtedness as so
scertained by said State Tax Commission and of
ie recording fees of the probate judge; or, second,
ie owner of any such instrument, or his agent, or
torney, may have such instrument recorded by
aying to the probate judge of the county in which
ie instrument is offered for record, the privilege
x on the entire amount of the indebtedness se-
ired by such instrument, and may thereupon
resent his petition to the State Tax Commission
ithin thirty days after said instrument is recorded,
id it shall be the duty of said commission to ascer-
in the value of the whole property and of that
art of it located within this State, and to fix and
etermine the amount of the indebtedness upon
hich the tax shall be paid, and said commission
iall thereupon ascertain such valuation and fix and
etermine such indebtedness and shall order the
dge of Probate to refund the excess of privilege
x collected by him, and the probate judge shall
mply with such order; and the tax paid upon the
tire amount of such indebtedness shall be held by
e probate judge until the State Tax Commission
etermines the amount of the indebtedness upon
hich such tax shall be paid.

FILED
MAR 2 1923
WM. R. STANSBURY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1922.

No. 428.

FEDERAL LAND BANK OF NEW ORLEANS,
Plaintiff in Error,

v.

D. W. CROSLAND, JUDGE OF PROBATE.
Defendant in Error.

ON WRIT OF ERROR AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF ON BEHALF OF RESPONDENT AND DEFENDANT IN ERROR.

The Brown Printing Co., Montgomery.

INDEX

Pages

Statement of case made by record 1-4

Copy of parts of State statute in question, which are sought to be declared unconstitutional 2, 3

Propositions of law invoked and authorities cited in support thereof 5, 6

Argument as to remedy of mandamus 7, 8

Argument on main issue as to whether the tax in question is a property tax or a tax upon a privilege or benefit conferred ..... 9-22 inclusive

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1922.

No. 428.

FEDERAL LAND BANK OF NEW ORLEANS,
Plaintiff in Error,

v.

D. W. CROSLAND, JUDGE OF PROBATE.
Defendant in Error.

ON WRIT OF ERROR AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF ON BEHALF OF RESPONDENT AND DEFENDANT IN ERROR.

STATEMENT.

The case made by the record is so fully and well-stated in the brief of counsel for petitioner and plaintiff-in-error that we will not attempt to re-state the facts of the case, but will merely supplement the statement of counsel for plaintiff in error.

The Alabama statute, parts of which petitioner and plaintiff-in-error challenge as unconstitutional and void, is set out in an appendix to the brief of counsel for petitioner and plaintiff-in-error. A great deal of the statute so set out is of no importance and can have no bearing on the decision of this case, but a very material part of the statute is omitted. It is subdivision *"h"* of Schedule 71 which is omitted. Counsel for plaintiff-in-error set out all of schedule 71 of the Alabama statute in question except subdivision *"h"* which is the last subdivision of the schedule. This subdivision may be very material. In fact, subdivision *"a"*, *"h"*, and *"i"* are the only subdivisions of the statute in question which can be of any interest or importance in the decision of this cause. For ready and easy reference we will here set out subdivisions *"a"*, *"h"*, and *"i"* of the statute in this case. These subdivisions of the statute in question read as follows:

> "Schedule 71. *Mortgages.*—(a). No mortgage, deed of trust, contract of conditional sale, or other instrument of like character which is given to secure the payment of any debt, and which conveys any real or personal property situated within this State, or any interest therein, shall be received for record unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to-wit: Upon all such instruments which are executed to secure any indebtedness which shall not exceed one hundred dollars, there shall be paid the sum of fifteen cents, and upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage, deed of trust, contract of conditional sale, or other instru-

ment of like character, to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender."

"(h). Any probate judge who shall file for record, or shall receive any mortgage, deed of trust or other instrument in the nature of a mortgage, without collecting the recording or registration tax provided for the recording or registration of such instruments, or who shall fail to certify the fact that such tax has been paid before the filing and recording of such instrument, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one thousand dollars.

"(i). Any probate judge who fails to keep an abstract of mortgages or other instruments intended to secure the payment of moneys, which are filed in his office for record, as he is required by law to keep, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than five hundred dollars."

The contention and insistence of petitioner and plaintiff-in-error are that the provision of the above quoted statute, which requires the payment of recording fee of 15c per each hundred dollars of such indebtedness or fraction thereof, which is secured by the mortgage, as a prerequisite or condition precedent to having the mortgages of plaintiff-in-error filed for record is unconstitutional and void in so far as the statute is attempted to be applied to registering or recording the mortgages of the plaintiff-in-error; and that mandamus is the appropriate remedy to compel the recording officer to register and record the mortgages of the plaintiff-in-error notwithstanding the statute in question expressly prohibits the recording officer from receiving, registering, or recording the instrument without

the payment of the privilege tax fixed by the statute; and notwithstanding the fact that the statute in question makes the recording officer guilty of a misdemeanor and subjects him to punishment, if he receives any mortgage, deed of trust, or other instrument in the nature of a mortgage without collecting the recording or registration tax provided for recording or registration of such instruments.

The contentions and insistence of the defendant-in-error are: First that the provisions of the statute complained of are not unconstitutional or void, but that they are valid; that they apply to all mortgages, including those of plaintiff-in-error, which are registered or recorded in the registration offices of Alabama.

Second, That the privilege tax of 15c per each hundred dollars of the debt secured by the mortgage is not a property or ad valorem tax, but is a tax upon a civil privilege or benefit conferred by the state statutes of which the plaintiff-in-error may avail itself or not, as it deems proper; but that it is not entitled to receive the benefit or privilege conferred without paying the price fixed by the statute.

Third, That if it should be conceded that the privilege tax thus imposed was a property tax and void so far as it applied to the plaintiff-in-error, still a court would not compel the defendant-in-error to do a thing which the very statute itself, which confers the authority and imposes the duty, prohibits him from doing and makes it a misdemeanor for him to do the act in the mode and manner in which he is sought to be compelled to perform the act.

PROPOSITIONS OF LAW INVOKED.

Mandamus is used merely to compel action and the performance of a duty. It can never have the effect to create authority or to confer power. It is in no sense a creative remedy. It can only compel action when there is a plain duty to act without mandamus. It will never compel the performance of an act which would be unauthorized or unlawful in the absence of a writ of mandamus.—*High's Extraordinary Legal Remedies*, sec. 7, p. 11; *Cook vs. Candie*, 52 Ala., 109; *State vs. Commissioners*, 57 Ala., 240; *State vs. Lewis*, 35 N. J. L., 377; *State vs. Mayor of Newark*, 35 N. J., 296.

Mandamus is never granted to compel the performance of an unlawful act or to aid in carrying out an unlawful proceeding. It will never be granted to compel the performance of an official act when substantial doubt exists as to the duty of the officer to perform such act, or where the officer sought to be compelled has no authority to perform the act in question.—*High's Extraordinary Legal Remedies*, sec. 40, p. 48; *Vossburg v. McCreary*, 77 Tex., 568.

Mandamus is an extraordinary legal remedy. Relief may be had by mandamus only in the absence of any other adequate remedy. Its issuance is justifiable only in favor of the petitioner who shows a clear legal right to the thing demanded and an imperative duty on the part of the respondent to do the act required. The duty of defendant-in-error to register and file for record the mortgages of plaintiff-in-error can hardly be said to be "a duty imperative", when to perform or discharge that duty he must violate the express provisions of the statute which alone authorizes him to register or record such instruments.—*Indiana ex rel Winter Rownd*, 91 N. E. 956; s. c. 30 L. R. A. (N. S.),

886; *Fort Royal Mining Company vs. Hagood*, 30 S. C., 519; 3 L. R. A., 841; 26 Cyc. L. & P., p. 156; 19 Am. & Enc. Encyc. Law, 763.

The privilege tax in question of 15c per each hundred dollars of the debt secured by the mortgage for the privilege of having it registered and recorded, the payment is required not annually as other property taxes, but once during the entire life of the mortgage. Both the recording and registration, and the payment of the privilege tax are voluntary on the part of the owner of the mortgage. Therefore the tax is not a property or ad valorem tax; but is a tax upon a privilege or benefit conferred by the state statutes.—*State v. Ala. Fuel & Iron Co.*, 188 Ala. 511; *Barnes v. Moragne*, 145 Ala., 313; *Hooper vs. State*, 141 Ala., 111; *Mutual Benefit Life Insurance Co. vs. County of Martin*, 104 Minn., 179; *Wheeler v. Wightman*, 96 Kans., pp. 67, 74 and 75; *Opinion of Attorney General, Garland*, vol. 18, p. 491, et seq. of the Opinions of the Attorney General of the United States.

Congress can no more impose a tax or burden upon or regulate a *state agency* such as the system of recording and registering deeds, mortgages, and other conveyances in the State, than the State can impose a tax, burden or regulate the *federal agency*, such as the Federal Land Bank, the plaintiff-in-error.—*Judson on Taxation*, sec. 579, p. 660; *The Income Tax case of* 1895 *and of* 1864; *Collector vs. Day*, 11 Wallace, 113; *U. S. vs. Railroad Co.*, 17 Wallace, 322; and *Van Brockton vs. Tennessee*, 117 U. S. 151.

ARGUMENT AS TO REMEDY.

An important preliminary question as to the remedy, lies across the door sill of the discussion of the main questions as to whether or not the state statute in question, imposes or attempts to impose a property tax, or whether it imposes a mere privilege tax upon a benefit or privilege conferred by the statute. That question which we believe this record presents is this:

Will a State or Federal Court compel by mandamus, a mere administrative state officer to do a given act, in a mode, manner, or upon condition, when the state statute conferring the sole authority and imposing the sole duty on the officer to act, expressly prohibits the officer from so doing; and when the statute makes the doing or the performance of such act in the mode and manner compelled by the court to be a misdemeanor, and provides a punishment and penalty against the offender?

If the recording and registration statutes of Alabama be void, then the defendant-in-error had no authority, and consequently no duty was imposed upon him, to register or record the mortgage of the plaintiff-in-error tendered him for registration and record. If the Legislature of Alabama has the authority by statute to establish and provide a system of registering and recording deeds, mortgages and other instruments evidencing title to property in Alabama, then it has the power and authority to prescribe the mode, manner, and terms upon which such instruments may be recorded, and to prohibit the registration and recording of such instruments upon other terms and conditions than those prescribed in the statutes.

If the Constitution, State or Federal, or even the common law of this state, had imposed a duty upon the de-

fendant-in-error to register and record the mortgage of plaintiff in error so tendered him, and the Legislature of Alabama had by a void statute attempted to exempt him from such duty, or to impose unlawful conditions or terms upon his registering or recording such mortgage, then a court might compel him by mandamus to discharge the legal duties imposed upon him by the Constitution or common law; but when the very statute which confers the authority and imposes the duty to register or record the mortgage also imposes the conditions or terms upon which the mortgage may be registered or recorded, and prohibits the instrument from being registered or recorded unless the conditions and terms prescribed are conformed to, and makes the registration or recording of the instrument without a compliance with the terms and the conditions mentioned in the statute a misdemeanor, then no court will compel the recording officer to violate the only law which authorizes him to register or record the mortgage. This defendant-in-error, when requested to register and record the mortgage of plaintiff-in-error had to look to the State statutes for his authority to either receive or record such instrument, and when he looked to such statutes, he found that the statutes which conferred the authority upon him to register and record the mortgage, expressly prohibited him from even receiving it for record unless the privilege or license tax which the statute required was paid in advance, and the statutes made the receiving of or recording such instrument without the payment in advance of the charges a misdemeanor and subjected him to a severe fine for its violation.

Therefore are not these questions pertinent: Can a State or Federal Court confer the authority or impose a duty which the Legislature has denied? Will the court compel the defendant-in-error to violate the very statutes

which conferred the authority and imposed the duty upon him to register or record the instrument in question?

The contention of the defendant-in-error is that Congress could not require the State of Alabama to register and record deeds or mortgages made to the United States or its agencies. If, however, it should be conceded that Congress has such power it is certain that Congress has not yet attempted so to do.

ARGUMENT ON MAIN ISSUES.

Recording the mortgages and the payment of the tax by plaintiff-in-error is voluntary. Counsel for plaintiff-in-error in their brief after quoting from the opinion of the Supreme Court of Alabama holding that the payment of the tax is voluntary, for that the tax is not imposed unless the mortgage is placed upon record, quote parts of section 3373 and 3383 of the Code of Alabama as shown on page 18 of their brief, and conclude as follows:

> "Therefore it will be noted that section 3383 makes it imperative to record if one is to *preserve* his security."

The conclusion is not a logical or legitimate one. The plaintiff in error can "*preserve*" all securities that it has by virtue of its mortgage or by virtue of the acts of Congress, without recording it or without paying for the privilege of so recording it, but it cannot obtain the benefits or securities which the Alabama statutes confer upon its mortgage unless it records it and pays the price of the privilege of recording it, as is provided for in the Alabama statutes.

The Alabama statutes, some of which are quoted above, confer privileges, immunities and securities upon mortgages provided they be recorded as is authorized by the

Alabama statutes; but to be recorded the same statutes require that the owner of the mortgage must pay the price fixed by the statute in order to obtain the privilege and securities conferred by the statute, and not "to preserve" a security which it already had.

It is not denied that schedule 71 of section 361, page 420 of the Acts of 1919 (Acts of Alabama, 1919), as set forth in the appendix of plaintiff-in-error's brief, does provide for a privilege or license tax for recording mortgages, deeds, etc. In fact the statute itself so denominates the charges or tolls as "privilege or license taxes"; but the important question is upon what is the tax imposed? If it is imposed upon the property of the mortgagee or grantee, or if it is imposed upon the owner of the mortgage or grant, or if it is a burden or regulation of the business of the grantee or mortgagee, then of course it would be void; certainly so far as this plaintiff-in-error is concerned, as we have heretofore conceded in this brief. The contention of defendant-in-error and the holding of the Supreme Court of Alabama is that it is not a tax upon property of any kind, and that it is not a burden or regulation imposed upon any business of the mortgagee or grantee; but that it is a charge or tax for privileges and benefits conferred by the State in providing a system of recording and registration laws which is intended to prevent frauds, and to secure and make certain titles to property within the State of Alabama.

Such was the holding of Attorney General Garland in the Virginia case to be found in Volume 18, page 491 et seq. of the Opinions of the Attorney General of the United States. The Attorney General in that case said:

> "The tax referred to is not strictly speaking a tax upon either the instrumentalities, agencies or properties of the United States. * * * * * * The tax is upon

> the registration of deeds, a means provided by the State for the prevention of fraud in transactions affecting the title to real property."

Counsel for plaintiff-in-error have either not examined the opinion of Attorney General Garland above referred to, or they have entirely misinterpreted it. Counsel say at page 12 of their brief in referring to the opinion of Attorney General Garland:

> "It will be found that the sole question there involved was the payment of an actual fee for the actual cost of recording an instrument in an administrative office."

Counsel are in error in this conclusion. The case the Attorney General had under consideration was a case in which there was a conveyance to the United States itself of property, a part of which was in Virginia and the deed to the United States was by an agent of the Federal Government presented to the Clerk having charge of the records for recording such instruments in Virginia. Under the laws of Virginia, the charge, toll or tax for recording such instruments was very similar to the laws of this State now in question. The charge in Virginia as in Alabama, was composed of two items. One item was a gross sum to be paid for the mere mechanical work of copying the instrument or deed into the registration record for deeds, and the other item in Virginia as in Alabama was graduated according to the value of the property conveyed by the deed. The agent of the Federal government who offered the deed for registration offered to pay the first item but declined to pay the last, claiming that it was an unauthorized tax as is claimed in this case. This is made certain from a reading of the opinion of the Attorney General. Volume 18, page 491, et seq., Opinions of the Attorney General of the United States. An opinion more

apt than that of the opinion of the Attorney General above referred to we cannot hope to find.

Counsel for plaintiff-in-error in their brief cite and rely upon the case of *Mutual Benefit Ins. Co. v. County of Martin*, 104 Minn. 179. This is one of the authorities which we relied upon in the Supreme Court of Alabama, and also in our brief heretofore filed in this case.

The Supreme Court of Minnesota in that case held exactly in accordance with the holding of the Supreme Court of Alabama; that is to say, that the tax in question was not a tax upon the property of the Insurance Company, nor upon its business but that it was a tax upon the security conferred by the statutes of Minnesota. That Court held as did the Supreme Court of Alabama that the fact that the amount of the debt secured furnishes the rule or standard for measuring the amount of the tax which must be paid as a condition precedent to receiving or enjoying the privilege or security conferred by the statute did not make it a tax upon the property. The entire opinion in that case, as well as the decision of the Supreme Court of Alabama, are against the contention of counsel for plaintiff-in-error.

Counsel for plaintiff-in-error, we contend, were unfortunate in citing and relying upon the case of Wheeler vs. *Weightman*, 96 Kan. 69 and 70. That case has saved us considerable labor and effort in writing this brief, in that it distinguishes the Alabama and Virginia statutes upon which we rely, from those of Kansas, New York, Michigan, and other States, upon which opposing counsel rely. The Supreme Court of Kansas took the trouble to point out the differences between the statutes of Virginia and Alabama and those of Kansas, New York, etc., and after quoting a considerable portion of the Alabama statute at pages 74 and 75, 96 Kansas, which statute was the progenitor of the

statute now in question and not different from it, insofar as the decision of this cause is concerned, said:

> "These taxes are distinct from ordinary property taxes. The Supreme Court of that State (Va.) held that this tax is not a property tax, but a tax on the civil privilege of enjoying the benefits and advantages of the registration laws," citing *Pocahontas Co. vs. Com.*, 113 Va. 108, and *Saville vs. Va. Ry. Co.*, 114 Va. 444.

After quoting from the opinion of the Virginia case above cited, the Supreme Court of Kansas added:

> "No amount of metaphysical involution can harmonize the Alabama and Virginia laws with the Kansas law. While the contribution is levied as the price of a privilege, a person may pay the price and enjoy the privilege or forego the privilege and avoid paying the price. The contribution is not exacted unless enjoyment of the benefits and advantages of the privilege is claimed."

The Court then goes on to point out the difference between the two classes of statutes, those of Kansas which follow the New York statute and those of Alabama and Virginia, and shows that the mortgage tax imposed by the Kansas and New York laws is a property tax, while that imposed by the Alabama and Virginia laws is not a property tax, but a contribution required for the benefit of a privilege conferred.

The defendant-in-error could not hope to find a stronger case to support his contention than the Kansas case relied on by counsel for plaintiff-in-error.

Counsel for plaintiff-in-error at page 8 of their brief say:

> "This statute is in no sense novel to the State of Alabama, but has been the subject of interpretation by the highest courts of other States. The statute was patterned after the laws of New York of 1906."

Counsel for plaintiff-in-error surely did not compare the statutes of the two States and surely did not read the opinion in the case of *Wheeler vs. Weightman*, 96 Kansas, pp. 70, 74 and 75 et seq., which they cited and relied upon. The Alabama statute could not have been patterned after that of New York of 1906, for the all-sufficient reason that the original Alabama statute from which the present Alabama statute now in question was copied so far as any question involved here is concerned, was enacted by the Legislature of Alabama in 1903. See Acts of Alabama 1903, page 127. See also paragraph 7 of section 2082 of the Code of Alabama, which is a codification of the original Act as amended by Act of 1907, page 403. An Alabama statute of 1903 therefore could not have been patterned after the New York statute of 1906. The Alabama statute has from its inception in 1903, been construed by the Supreme Court of Alabama not to be a property or an ad valorem tax. The history of the statute up to 1906 was reviewed by the Supreme Court of Alabama in the case of *Barnes vs. Moragne*, 145 Ala. 313 et seq. In that case it was insisted by the appellant Barnes that the statute then in question which is identical with the statute now in question so far as this case is concerned, imposed a property tax, but the Supreme Court of Alabama held that the statute "only provides for a *'privilege tax'* on recorded mortgages, once for the life of the mortgage, which is in no sense an ad valorem tax", and the court further added that to hold the statute to impose a property tax would render it unconstitutional, the Court saying: "But we are precluded from holding this view because to so hold would render the provision of the Act under consideration uncon-

stitutional". This for the reason that section 211 of the Constitution of Alabama provides that all taxes levied on property in this State shall be assessed in exact proportion to the value of such property, thus requiring uniformity, and section 214 of the Constitution of Alabama limits the rate of taxation to 65 one-hundredths of one per centum on the value of the taxable property.

There is not now and never has been, so far as we know, any contention that the Alabama statute now in question or any of its progenitors, imposed a tax upon the property embraced in the mortgage. It has, however, been contended that it did impose a tax upon the debt or demand secured by the mortgage. The Supreme Court of Alabama, however, three times answered that question by demonstrating that it was not a tax upon the debt or demand secured by the mortgage and that to hold that it was a tax upon the debt or demand so secured would render the statute void because conflicting with the Constitution of the State of Alabama. For example, the tax is 15 cents upon every hundred dollars or fraction thereof of the debt or demand so secured. This debt or demand on its face, may be a thousand dollars, when its real value may not be a hundred dollars. In such case it would violate both sections 211 and 214 of the Constitution of Alabama. If the debt or demand should be of its face value, it would still violate section 211 for the reason that the property would be assessed at only 15 cents on every one hundred dollars worth, when all other property was taxed 65 cents on every one hundred dollars worth. Consequently as stated by the Supreme Court of Alabama, to hold that this is a property tax upon the debt secured would render it void under the Constitution of the State of Alabama.

In all cases of doubt contemporaneous constructions of statutes and constitutional provisions are looked to. Applying this rule of construction we find that the State of

Alabama itself, and every agency of the State, the United States itself, and its agencies, such as national banks, have paid this privilege tax imposed by the Statute in question without ever contesting its validity or claiming that it was a property tax or that it was a tax upon the State or its agencies, or upon the United States or its agencies. The Federal Land Bank, this plaintiff-in-error, is the first State or Federal agency that has questioned the validity of the statute or denied the power and authority of the State to impose this privilege tax in Alabama. The Virginia cases and the opinion of the Attorney General of the United States heretofore cited in this brief, offer the only instances which we have been able to find where the power or authority of the State to impose this tax has been challenged, and in each instance the decision was in favor of the power and authority of the State.

We believe we have shown in this brief and we are sure that the Supreme Court of Kansas has demonstrated in its opinion in the case of *Wheeler vs. Weightman*, 96 Kansas, pages 70, 74, 75 et seq., that the Alabama and Virginia statutes imposing the privilege tax as for recording mortgages, deeds, etc., are entirely different from the Kansas, Michigan, Minnesota and New York statutes which have been held to impose a property tax upon mortgages or the debt secured thereby, or upon the property embraced in the mortgage. The only authority or decisions cited or relied upon by counsel for plaintiff-in-error to hold that the tax in question is a property or ad valorem tax and therefore cannot be imposed upon the United States or its agencies, are decisions of State Courts construing their respective State statutes, which we have shown and which the Supreme Court of Kansas has shown were entirely and radically different from the Alabama and Virginia statutes.

As before stated in this brief, it has never been contended by counsel for defendant-in-error nor by the Su-

preme Court of Alabama that the State of Alabama could impose a tax or burden upon the property of the United States or any of its agencies or that it could regulate the business of any Federal agency. Consequently we have no criticism or answer to make as to the decisions of any court, State or Federal, announcing these propositions, which are Hornbook and axiomatic.

The insistence of counsel for defendant-in-error and the holding of the Supreme Court of Alabama is that the charge or tax of 15 cents on a hundred dollars or fraction thereof, of the debt secured by the mortgage was a privilege tax imposed for the benefit of the privilege and security conferred by the Alabama statutes, which provide a system for registration and recording of titles to property in the State of Alabama. We have shown that such was the holding of the *Supreme Court of Minnesota,* 104 Minn., 179, and the *Supreme Court of Kansas,* 96 Kan., page 70 et seq., and the *Supreme Court of Virginia,* 114 Va. 444, and 113 Va. 108, heretofore cited and quoted from, and we respectfully insist that counsel for plaintiff-in-error have not cited a single decision holding to the contrary which was construing statutes similar to those of Alabama or Virginia.

Opposing counsel are in error when they argue and contend that the Alabama statute here in question is like the New York statute, the Kansas statute and the Michigan statute, which have been held to impose a property tax. Conceding as it must be done that all property of the State and its agencies and all of that of the United States and its agencies are exempt from taxation, we ask is it not singular that the State of Alabama and all of its agencies, that the United States and all of its agencies except the plaintiff-in-error, should have paid this privilege tax for twenty years without questioning its validity if it be a property

tax, or one which the Legislature of Alabama under the State and Federal Constitutions could not impose upon the property of the State or its agencies or upon that of the United States or its agencies?

It was argued by the counsel for the plaintiff-in-error in the Court below, and is inferentially if not directly argued in this Court, that the provisions of the Act of Congress which created, established and provided for the Federal Land Bank prevents the Alabama statute in question from applying to mortgages or conveyances of property executed to the Federal Land Bank. We contend that the Act of Congress establishing or creating the Federal Land Bank known as the Federal Farm Loan Act, 39 Stat., Part 1, pp. 377-380, sec. 26, referred to by counsel in their brief contains no provision exempting or attempting to exempt the Federal Land Bank from the payment of the charge or toll in question which is imposed by the Alabama statute. Moreover we contend that to so construe the Act of Congress known as the Federal Farm Loan Act would render such provision of the Federal Act void. Congress can no more impose a tax or a burden upon the State agencies than the Legislature can impose a tax or a burden upon the Federal agencies. If Congress can require a State agency to register and record instruments without payment of the charge or taxes which the State law provides, then it would certainly impose a tax or a burden upon a State agency. Consequently to construe the Federal statute as counsel for plaintiff-in-error insist that it should be construed, would render it void.

It is contended by counsel for plaintiff-in-error at pages 19 and 20 of their brief that the fact that the Federal Farm Loan Act prohibits a payment of any charge by any one other than the borrower, and the fact that the Alabama statute demands that the privilege tax be paid by the

lender, renders the Alabama statute void and unenforceable. The Supreme Court of Alabama disposes of that question by saying that this could be met by negotiation. It is seriously contended by opposing counsel in their brief that this conflict between the two statutes cannot be met or disposed of by bargain or negotiation and that there being conflict between the State and Federal statutes, the Federal statute must prevail. It is undoubutedly true that if there be a conflict between a State and Federal statute, that the Federal statute must control as to all matters which Congress has power and authority to control, but it cannot control as to matter as to which Congress has no authority or power to control. We have shown that Congress has no power or authority to either establish or regulate a system of registration and recording deeds, mortgages or conveyances of titles for the State. This is matter within the exclusive control of the Legislature of the State. Congress of course, can regulate the contract which shall be made between the borrower and the lender as to loans made by the Federal Land Bank, but it cannot regulate and control as to the matters relating to the registration and recording of deeds, mortgages and conveyances of property situated in the State of Alabama. These matters are within the exclusive control of the Legislature of the State.

It is seriously argued and contended by opposing counsel from the mere fact that the proceeds arising from this privilege tax is paid into the State and county treasury and that the provision is found in the Revenue Act of Alabama, that the tax in question is a property or ad valorem tax and not a charge or privilege tax for a benefit conferred by the State statute as was held by the Supreme Court of Alabama. We confess that these are circumstances to which the Court might look in determining whether a given charge was a property or ad valorem tax

or a contribution required for a mere privilege or benefit conferred. They are not, however, controlling circumstances. There are other facts and circumstances which must be looked to, which show conclusively that the charge or tax in question is not a property or an ad valorem tax:

First, as is pointed out by the Supreme Court of Alabama, such a tax on property or ad valorem tax would violate several provisions of the State Constitution:

Second, the payment of the charge or tax is optional or voluntary on the part of the person or corporation who pays it. Its payment cannot be compelled by the State;

Third, the charge or tax is required to be paid but once during the entire life of the deed or mortgage, while all property taxes, both State and Federal, are compulsory and are levied and collected annually.

The mere fact that the Alabama statute in question finds its place among the revenue laws of the State of Alabama and forms a part of the revenue statute, which, under the Constitution of Alabama following precedents extending over a century, is enacted at every regular session of the Legislature, which for a long time was annual, and then for a long time was biennial, and since 1901 has been quadrennial, does not make the charge or privilege tax of fifteen cents on each one hundred dollars of the debt secured by the mortgage a property or ad valorem tax. The same is true as to inheritance and succession taxes. They unquestionably form a part of the revenue of the state and are uniformly called inheritance or succession taxes. Yet they are not property or ad valorem taxes and not within the constitutional limitations which apply only to property or ad valorem or per capita taxes. The charge, toll, or privilege tax provided for by the Alabama statute in question have been, by text writers and courts held to be similar or analogous to inheritance and succession taxes. While of

course the charge or tax, whatever it may be called, such as an inheritance or succession tax, is not a property tax, nor is it an ad valorem tax, although the amount of the tax may be measured by the value of the property which is bequeathed, conveyed or inherited, or which passes by succession. This court, together with state courts, has held that this charge or tax was a mere price exacted by the State for the privilege or benefit which the law of the State accorded in permitting property situated within the State to be transferred by will, descent, mortgage or other modes, and that even when the property was devised, bequeathed or granted to the United States itself, or to the State or to any agency of the United States or the State, that the devisee, legatee, distributee or beneficiary of the property devised, bequeathed, or that passed by succession was liable to pay the inheritance tax fixed by law of the State or of the United States, unless the law which fixed the tax exempted the property from the payment of such tax.—*United States v. Perkins,* 163 United States, 625; 16 Sp. Ct. Rep. 1073.

The holding has been the same, whether the property was devised or bequeathed to the United States or to the State, that if it was devised to the United States, it was taxable by the State and if devised to the State it might be taxable by the laws of the United States.—*Schneider v. Buttman,* 190 U. S. 249, 23 Sp. Ct. Rep. 803.

These cases have been repeatedly cited and followed by the State and Federal courts, and applied where the legacy or bequest consisted of United States bonds which contained provisions that they were agencies of the Federal Government and should never be liable to Federal or State taxes. Under the same rules and doctrines of law, the charge, toll, or tax required by the State to be paid for the registration or recording of mortgages or other instru-

ments conveying or evidencing title to property in the State of Alabama is not a property or ad valorem tax, but is a tax for the privilege, benefits, and securities accorded by the State law which provides for the registration and recording of such instruments. The Supreme Court of Virginia expressly decided that the two kinds of taxes were analogous.—*Pocahontas v. Virginia*, 113 Va. 108.

For the reasons stated above, it is respectfully suggested that the opinion and the decision of the Supreme Court of Alabama, sought to be reviewed and revised in this proceeding, should be affirmed.

HARWELL G. DAVIS,
Attorney General.

JAMES J. MAYFIELD,
Assistant Attorney General.
For the Defendant-in-Error.

Office Supreme Court,
SEP 21 1922
WM. R. STANSB
CLE

No. 428

Supreme Court of the United States

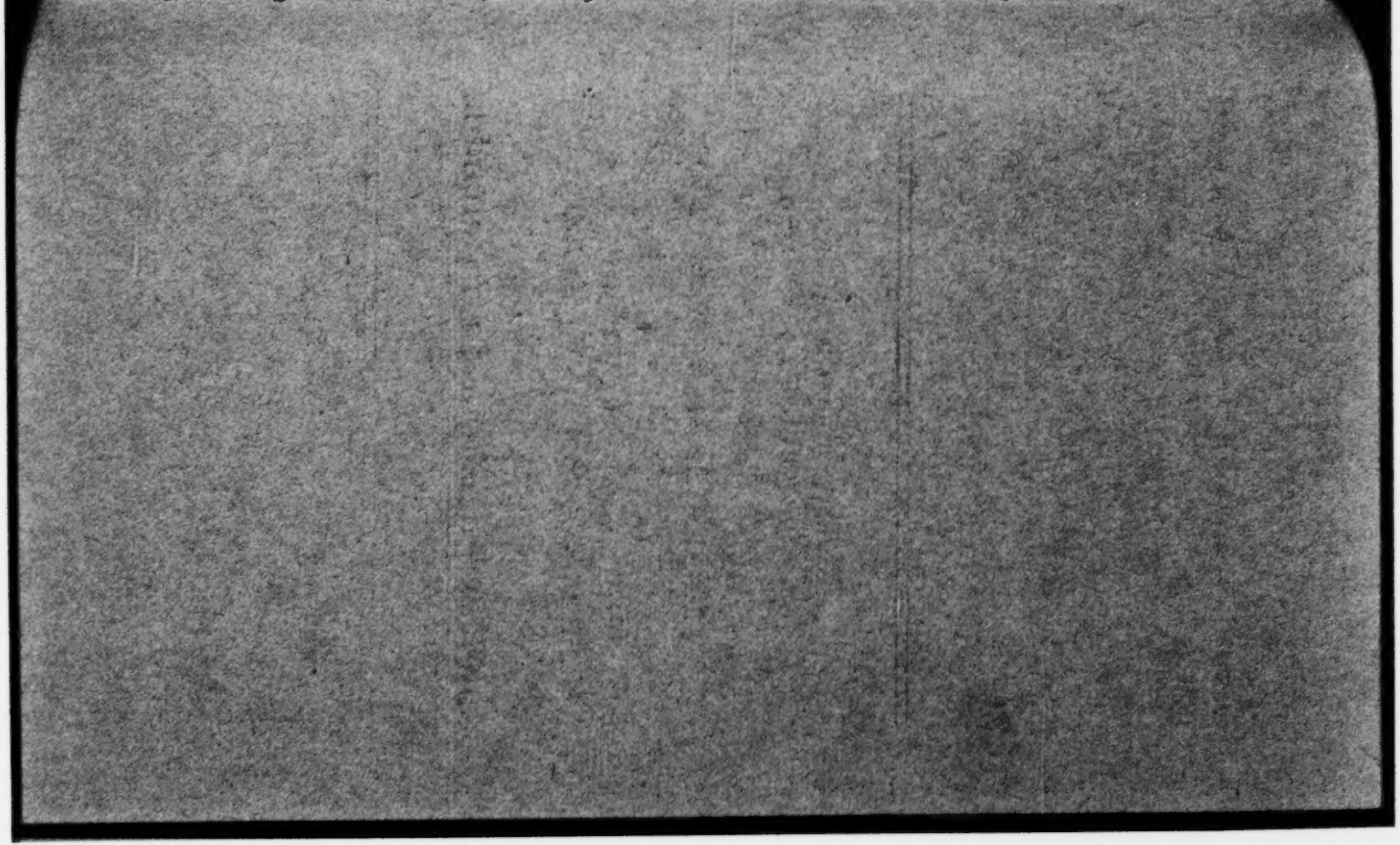
October Term, 1922

FEDERAL LAND BANK OF NEW ORLEANS, *Petitioner*

vs.

D. W. CROSLAND, JUDGE, ETC., *Respondent.*

Brief and Argument for Petitioner.
By W. A. Gunter, Attorney



Supreme Court of the United States

October Term, 1922

FEDERAL LAND BANK OF NEW ORLEANS, *Petitioner*

vs.

D. W. CROSLAND, JUDGE, ETC., *Respondent.*

Brief and Argument for Petitioner
By W. A. Gunter, Attorney

STATEMENT OF THE CASE

The Petitioner, being a Federal Land Bank located at and doing business in New Orleans, La., under the Federal Farm Loan Act, in the course of its business, took a mortgage on land situated in Montgomery County, Alabama, and offered its mortgage to the proper officer, the respondent, to be recorded upon the Book of Mortgages, kept for that purpose and along with such offer, tendered in full the regular and lawful fee for recording the mortgage; but the officer refused to accept the mortgage along with the fee tendered for the work to be done unless the Petitioner would also pay the revenue charge for the State of fifteen cents per hundred dollars and fraction thereof, on the amount of the mortgage debt. This demand Petitioner refused to pay, and obtained from the proper court a *mandamus* to the respondent, to accept and record the mortgage without the payment of this tax of fifteen cents per hundred dollars and fraction

thereof, of the amount of the mortgage, levied by the State as a Revenue Tax under Schedule 71 of Section 361 of the Revenue Law of Alabama of 1919, "Acts of 1919, p. 420," on the ground that such law was unconstitutional and forbidden by the Federal Statute under which Petitioner was organized and doing business.

Statutes at Large, Vol. 39, paragraph 1, pages 377-378-380.

The respondent, Crosland, appealed the case to the Supreme Court of Alabama, which after hearing, decided that the tax was lawful and should be collected. Thereupon, after a petition for re-hearing had been, on full argument and consideration, refused, petitioner obtained a Writ of Error from the Supreme Court of the United States to the Supreme Court of Alabama, now pending in this Court, and at the same time fearing the possibility of a mistake in the form of its remedy, petitioned this Court for a Writ of *Certiorari*, to the Supreme Court of Alabama, which petition is now submitted for hearing.

LAW POINTS

1. The Federal Agencies of Government are by implication exempt from taxation by the States, and they are doubly so exempt when there is, as here, an express Federal Statute declaring them to be such agencies, and exempt from all taxation.

U. S. Statute at Large, Vol. 39; paragraph 1, pp. 377-378-380.

McCulloch v. Maryland, 4 Wheat. 367; 4 L. Ed. 579.

Arguments for Plaintiff in Error, same case, 4 Wheat. *supra.*

Rose's Notes to same case, U. S. Rep. 4 L. Ed. 579.

Notes to 69 A. S. Rep. 39.

Notes to 45 L. R. A. 737.

Washington v. Case, 1 L. R. A. (N. S.) 153 and notes.

2. An assessment for revenue by the State of a tax of fifteen cents per hundred dollars, and fraction thereof, on the amount of money secured by mortgage, in addition to the regular and lawful fees for recording, as a condition upon which alone the mortgage can be admitted and received for record, especially in view of a General Law of the State, Code of 1907, Section 3383, making unrecorded mortgages void as to creditors and purchasers without notice, is, by its essential nature, a tax on property, no matter in what ambush of words it may be hid or expressed —and thus is void when extended and applied to mortgages of Federal Land Banks.

26 R. C. L., Sec. 19, page 36, where subject is fully treated.

Washington v. Case, 1 L. R. A. (N. S.) 153.

8 Words and Phrases, "Tax" 6867 *et seq.*

McCulloch v. Maryland, 4 Wheat. 367.

Authorities, under point 1, *supra.*

Wheeler v. Weightman, 96 Kan. 50.

Same case, L. R. A., 1916A, p. 846.

3. A tax on a mortgage on land, is a property tax, on the assessed or assumed value of the security, and when the land is also taxed to its full value irrespective of the mortgage, it is double taxation in States forbidding double taxation.

Strempf v. Storz, 23 L. R. A. (N. S.) 152, and notes thereto *Ib.*

And in any event, and all cases is a tax on the property-debt of the owner.

26 R. C. Law *supra.*

45 Cent. Dig. "Taxation." Sections 74-75.

8 Words and Phrases, 6867 *et seq.*

4. Taxation is a charge levied by the Sovereign on the property of its subjects, and is not extended to its own property and agencies, and as the Sovereign here consists of two parts, the State and the Federal Government, constituting the unit of Government, it may well be doubted, whether the State intended by its statute to include the instruments of the Federal part of the Government in the taxation of mortgages—they being figuratively, part of its own Sovereignty as they are expressly of the Federal Sovereignty.

Van Brockim v. Anderson, 117 U. S. 131, 29 L. 845.

People v. McCreery, 34 Cal. 432.

And thus that charging the Petitioner here is the unwarranted attack of the Supreme Court of Alabama, and not of the Legislature.

But, however that may be, Legislatures, no more than the Courts of the States, can violate the Constitution and Federal Statutes by the levy of a tax on the instrumentalities of the Federal Government—the inhibition being against all powers and agencies of power.

McCulloch v. Maryland, 4 Wheat. *supra.*

Authorities under point 1.

5. Of course, there is no intention in the Constitution or the Federal Statute to exempt the govern-

ment and its agencies from payment for goods, or supplies, for work and labor done for the Government and its agencies in current operation, and hence ferriages, transportation charges, work and labor done, such as fees for recording mortgages, are legitimate charges against the Government, the consideration for such charges being the property sold or work and labor done, and the consideration in all such cases is exhausted between each party to the transaction by the completion of the work or furnishing of goods and the payment of the price therefor, and in no wise, extends itself in any degree to the effect and purpose of the transaction, whatever it may be.

Thus, to illustrate, the current and lawful fees for recording a mortgage exhaust the consideration for the thing done, which whether good or bad, a privilege or a burden, is wholly or entirely an item or effect of a Governmental or Sovereign act or command, and has no connection whatever with the mere physical act of recording the mortgage. It is this distinction that is made by the Attorney General, Garland, in the opinion quoted and relied on by counsel for defendant, though the distinction was mis-applied in the particular case in which his opinion was given.

ARGUMENT.

After a century and more of a *Stare Decisis* followed in numbers of cases, to this day, and the assistance of an express statute of the U. S. directly upon the point, it would seem, in a progressive age, unnecessary to argue the sole question in this case, which is:

Whether or not a Federal Land Bank can be required to pay what is called a privilege or license tax of fifteen cents per hundred dollars, or fraction thereof, of a mortgage indebtedness, as a condition precedent to filing and recording the mortgage in the Probate office, *for General Revenue purposes for the State, beyond and in addition to the regular and lawful fees charged for recording the mortgage.*

The case of McCulloch v. Maryland, 4 Wheat. 367, 4 L. 579, decided in 1819, and followed for more than a century, and a direct statute of the U. S. cited in Law point 1, *supra,* under which the Land Bank in this case was organized, say:

This tax cannot be charged, no matter under what camouflage of words it may be obscured.

The Constitutional and Statutory Prohibitions are, that *taxes,* which mean charges imposed by the Government to supply its revenue, shall not be assessed against the Bank. We do not care whether it is one sort or another of tax, as it is in every case within the inhibition. But it is here certainly a tax on property, and the Legislature imposing such tax very well understood it to be an *ad valorem* tax, for the tax is levied on the mortgage in the direct proportion of the nominal amount of the debt secured, being increased fifteen cents for every hundred dollars or fraction thereof of the amount, and Schedule 71 of the Act imposing the tax is a Section of the General Revenue Law imposing taxes for Revenue in the State, and the Section imposing the tax prescribes that its payment shall constitute an exemption against the collection of the *ad valorem* tax on mortgages generally, saying:

"There shall be no *ad valorem* tax collected on any such instrument or debt, secured thereby, which shall have paid the tax prescribed by this Section, either State, County or Municipal." Acts of Alabama, 1919, p. 421.

Who can look the Statute in its face and misunderstand the question here? The State enacts a General Revenue Law, containing in Schedule 71, quoted on page 7, in Petition for *Certiorari*, in which mortgages are taxed fifteen cents per hundred dollars and fraction thereof of the amount of the mortgage debt, as a condition for being received for record. And it provides a General tax on all credits at an *ad valorem* rate, but stipulates in Schedule 71, under discussion, that no *ad valorem* tax shall be required as to the mortgages which have been recorded. And by General Law, Code of 1907, Section 3720, that the charge for recording shall be fifteen cents per hundred words. And by another General Law, Code of 1907, Section 3383, provides that all mortgages not recorded shall be void as to purchasers and judgment creditors without notice.

The State passes for good Government a law that all mortgages shall be void as to purchasers and creditors unless recorded, Code 1907, Sec. 3383, and stipulates the fees for recording to be fifteen cents per hundred words, Code 1907, Sec. 3720. And then by Schedule 71, of the General Revenue Act of 1919, quoted on page 7, of petition for *Certiorari* provides that mortgages shall not be recorded, without payment of a tax of fifteen cents per hundred dollars and fraction thereof, and that such payment shall exempt them from the General *ad valorem* tax levied. And it is seriously argued, that this tax of fifteen cents per

hundred dollars on the amount of the mortgage debt is not a tax on property *ad valorem* or otherwise, but is a mere privilege tax levied for affording the opportunity of having the mortgage recorded.

It is evident that no matter what the tax may be called, it is not for the consideration of recording it, for that is expressly otherwise provided for and paid, and that consideration is exhausted; but that it is a tax for General Revenue purposes, and may be enlarged at the option of the Legislature, and involves the power to destroy the Government as declared in the McCulloch case.

If the Legislature did not understand the meaning of the Statute better than the Court below, and the Counsel in this Court, why did it put the tax as an item in its General Revenue Act? And if it did not consider the tax as and for the equivalent of an *ad valorem* tax, why did it exempt mortgages recorded from the General *ad valorem* tax on mortgages and other credits?

And how could it regard the recording of a mortgage as a mere privilege when it provided that unless recorded it should be void as to creditors and purchasers without notice? 26 R. C. L., Sec. 18, p. 35.

And also should be subject to the general *ad valorem* tax on contracts.

And what was the motive for providing a system of recording and fees for the work of recording except one of good government to prevent frauds and the more effectually to secure the people in their rights?

It is evident that it was a general provision of good government, not founded upon any consideration as for work and labor done or of privilege. A privilege

is optional, and not compulsory by a penalty or risk of danger from the omission to do an act.

26 R. C. L., Sec. 18, pp. 35-36.

On this can the State undertake to tax the United States or its instruments of government? It is, it appears to us, absurd to think of such a result, as it is directly in the teeth of a *Stare Decisis*, to the contrary, commencing with the McCulloch case, in 1819,, followed to this date, and is in direct opposition to the very words and spirit of the Federal Charter of the Bank, which says:

That the mortgages shall not be taxed by any contrivance in the world.

We think the confusion of the lower Court and of Counsel for Crosland, arises from thinking that the tax of fifteen cents per hundred dollars of the amount of the mortgage, is connected with the charge of fifteen cents per hundred words for recording, and is supported in some obscure and unaccountable way, by the consideration of work and labor done in recording the mortgage, which, of course, is an obvious mistake when the question is clearly presented. This collection of fifteen cents per hundred dollars is merely a convenient mode of collecting a tax for revenue on mortgages, which may come into existence at any date during the tax year, while the tax of fifteen cents per hundred words is for the work and labor done in recording, as to which there is no exception and ought not to be any, and it is the matter which the Attorney General, Garland, referred to in his opinion quoted in this case by the Court below, and which no doubt will be referred to on this hearing.

We freely admit that the Bank, like all persons and citizens, must pay for work and labor done, at its re-

quest, but we insist that the State cannot tax the government of the United States or its agencies, and that it should not attempt to do so, any more than it should tax its own property and agencies, since the Government of the U. S. and its agencies are parts of the general Government of the people, as the State Government is a part. And it seems that no apology or excuse can be made for the attempt to do so, since the act is so sternly forbidden by the Supreme Court of the land.

Respectfully submitted,

W. A. Hunter

Attorney for Petitioner.

FEDERAL LAND BANK OF NEW ORLEANS *v.* CROSLAND, JUDGE OF PROBATE.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 428. Argued March 7, 1923.—Decided March 19, 1923.

1. A first mortgage executed to a Federal Land Bank is an instrumentality of the Government and cannot be subjected to a state recording tax. P. 377.
2. Payment of a tax made a condition to the recording of a mortgage is not optional where, under the state law, failure to record would override the mortgage in favor of any purchaser without notice. P. 377.

207 Ala. 456, reversed; petition for certiorari dismissed.

ERROR to a judgment of the Supreme Court of Alabama which reversed a judgment of the State Circuit Court, in mandamus, requiring a state recording officer to record a mortgage without exacting the statutory tax.

Mr. William C. Dufour, with whom *Mr. Solicitor General Beck*, *Mr. John St. Paul, Jr.*, and *Mr. W. A. Gunter* were on the briefs, for plaintiff in error.

Mr. James J. Mayfield, with whom *Mr. Harwell G. Davis*, Attorney General of the State of Alabama, was on the briefs, for defendant in error.

If the recording and registration statutes of Alabama be void, then defendant in error had no authority, and consequently no duty was imposed upon him, to register or record the mortgage tendered him. If the legislature of Alabama has the authority to establish and provide a system of registering and recording instruments evidencing title to property in Alabama, then it has the power and authority to prescribe the manner and terms upon which such instruments may be recorded, and to

prohibit the registration and recording of such instruments upon other terms and conditions than those prescribed in the statutes.

If the constitution, state or federal, or even the common law of Alabama, had imposed a duty upon defendant in error to register and record the mortgage, and the legislature had by a void statute attempted to exempt him from such duty, or to impose unlawful conditions, then a court might compel him by mandamus to discharge the legal duties imposed upon him by the constitution or common law; but when the very statute which confers the authority and imposes the duty also imposes the conditions upon which the mortgage may be registered or recorded, and prohibits the instrument from being registered or recorded unless the conditions and terms prescribed are conformed to, and makes the registration or recording of the instrument without a compliance a misdemeanor, then no court will compel the recording officer to violate the only law which authorizes him to register or record the mortgage.

Congress could not require the State to register and record deeds or mortgages made to the United States or its agencies. If, however, it should be conceded that Congress has such power, Congress has not exercised it.

Recording the mortgages and the payment of the tax by plaintiff in error is voluntary. The plaintiff in error can preserve all securities that it has by virtue of its mortgage or by virtue of the acts of Congress, without recording it or without paying for the privilege of so recording it, but it cannot obtain the benefits or securities which the Alabama statutes confer upon its mortgage unless it records it and pays the price of the privilege of recording it, as provided for in the Alabama statutes.

It is not denied that this is a privilege or license tax; but the important question is, Upon what is the tax imposed? It is not a tax upon property, and it is not a bur-

den or regulation imposed upon any business of the mortgagee; it is a charge or tax for privileges and benefits conferred by the State. 18 Ops. Atty. Gen. 491; *Mutual Benefit Ins. Co.* v. *County of Martin*, 104 Minn. 179; *Wheeler* v. *Weightman*, 96 Kans. 69; *Barnes* v. *Moragne*, 145 Ala. 313.

The Federal Farm Loan Act, 39 Stat. 377–380, § 26, contains no provision exempting or attempting to exempt the Federal Land Bank from the payment of the charge or toll in question. Such a provision would be void. Congress can no more impose a tax or a burden upon the state agencies than the legislature can impose a tax or burden upon the federal agencies.

The Federal Farm Loan Act prohibits a payment of any charge by any one other than the borrower, while the Alabama statute demands that the privilege tax be paid by the lender. This could be met by negotiation. Congress, of course, can regulate the contract which shall be made between the borrower and the lender as to loans made by the Federal Land Bank.

The tax is on the privilege of transfer granted by the state law, and no transferee, whether individual, State or United States, can claim an exemption except as the state law allows one. *United States* v. *Perkins*, 163 U. S. 625; *Schneider* v. *Buttman*, 190 U. S. 249; *Pocahontas* v. *Virginia*, 113 Va. 108.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a petition for a writ of mandamus to require the recording officer of Montgomery County, Alabama, to record a first mortgage deed on receiving the fee for recording the same, without payment of an additional sum of fifteen cents for each one hundred dollars of the principal sum secured. The General Revenue Act of the State, approved September 15, 1919, by § 361, Schedule

71, [Acts 1919, p. 420] provides that no mortgage shall be received for record "unless the following privilege or license taxes shall have been paid upon such instrument before the same shall be offered for record, to-wit: . . . upon all instruments which shall be executed to secure an indebtedness of more than one hundred dollars there shall be paid the sum of fifteen cents for each one hundred dollars of such indebtedness, or fraction thereof, which is secured by said mortgage . . . to be paid for by the lender, and no such paper shall be received for record unless there is filed therewith a certificate that the privilege tax was paid by the lender." Any probate judge who shall receive a mortgage without collecting the "recording or registration tax" &c., is made guilty of a misdemeanor and punished.

On the other hand the Federal Farm Loan Act of July 17, 1916, c. 245, § 26, provides that first mortgages executed to Federal Land Banks shall be deemed "instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation." 39 Stat. 360, 380. The validity of this provision is not questioned. *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 207, 212. Of course therefore it must prevail over any inconsistent laws of a State.

The tax was sustained by the Supreme Court of the State and the petition for mandamus was ordered to be dismissed on the ground that the payment was optional; that the Federal Land Bank was not required to put its deed on record, and that if it did it must pay whatever others were required to pay for the registration of its security. But the case is not quite so simple as that. The law of Alabama does make it practically necessary to record such deeds, because it overrides them if not recorded, in favor of any purchaser without notice. While it does so it cannot say that it leaves the Bank free to

record or not. The Bank has a choice it is true, but so has one who acts under duress. *The Eliza Lines,* 199 U. S. 119, 131.

The State is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can escape its constitutional obligations by denying jurisdiction to its Courts in cases which those Courts are otherwise competent to entertain. *Kenney* v. *Supreme Lodge of the World,* 252 U. S. 411, 415. It is not necessary to cite cases to show that an act may become unlawful when done to accomplish an unlawful end.

Of course the State is not bound to furnish its registry for nothing. It may charge a reasonable fee to meet the expenses of the institution. But in this case the Legislature has honestly distinguished between the fee and the additional requirement that it frankly recognizes as a tax. If it attempted to disguise the tax by confounding the two, the Courts would be called upon to consider how far the charge exceeded the requirement of support, as when an excessive charge is made for inspecting articles in interstate commerce. *Foote* v. *Maryland,* 232 U. S. 494. But it has made no such attempt. It has levied a general tax on mortgages, using the condition attached to registration as a practical mode of collecting it. In doing so, by the construction given to the statute by the Supreme Court, it has included mortgages that it is not at liberty to reach. The characterization of the act by the Supreme Court as distinguished from the interpretation of it does not bind this Court. *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350, 362. *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346. It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax, but whoever pays it it is a tax upon the mort-

gage and that is what is forbidden by the law of the United States.

A petition for certiorari presented by the plaintiff in error for greater caution will be dismissed.

Decree reversed.